



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 355

INTERNATIONAL HARVESTER COMPANY AND
INTERNATIONAL HARVESTER COMPANY OF
AMERICA, APPELLANTS,

vs.

DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. CLIFFORD TOWNSEND, JOSEPH
M. ROBERTSON, ET AL., ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

INDEX.

	Original	Print
Proceedings in Supreme Court of Indiana.....	"A"	1
Caption.....(omitted in printing).....	5	
Assignment of error.....	6	1
Record from Superior Court of Marion County.....	8	2
Complaint.....	8	2
Summons and sheriff's return.....	27	16
Answer in general denial.....	29	17
Order setting cause for trial.....	30	17
Order of submission.....	31	17
Judgment.....	31	18
Motion for new trial.....	35	20
Order overruling motion for new trial and granting appeal.....	37	20
Order settling bill of exceptions.....	38	21
Bill of exceptions.....	39	21
Caption and appearances.....	39	21
Stipulation of facts.....	42	22
Plaintiffs' exhibit "B"—Depositions of John L. McCafrey and A. T. Woller.....	86	52
Caption and appearances.....	87	52
Deposition of John L. McCaffrey.....	88	53

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 15, 1943.

Record from Superior Court of Marion County—Continued

Bill of exceptions—Continued

Plaintiffs' exhibit "B"—Depositions of John L. Mc

Caffrey and A. T. Woller—Continued

	Original	Print
Deposition of A. T. Woller	126	79
Reporter's certificate	144	92
Plaintiffs' exhibit 1—Map showing International Harvester Company—Owned Branches, Sales and Service Locations	145-A	93
Plaintiffs' exhibit 2—Map of Key Distribution Areas	145-B	94
Plaintiffs' exhibit 3—Map showing Wholesale Grocery Trading Areas	145-C	95
Plaintiffs' exhibit 4—County Outline map—State of Indiana	145-D	96
Plaintiffs' exhibit 5—Comparison of freight charges to Indiana dealers	146	97
Plaintiffs' exhibit 6—Statement showing delivery charges for International Motor Trucks—effective in 1936	148	99
Plaintiffs' exhibit 7—Statement showing amount of Indiana manufacture and outside manu- facture of all goods, except repairs, etc., 1935 and 1936	151	101
Plaintiffs' exhibit 8—Table of sales of all goods, except repairs, etc., 1935 and 1936	152	101
Reporter's certificate	155	
Order settling bill of exceptions	156	102
Praecept for transcript of record	157	103
Clerk's certificate	159	
Notices of appeal	160	104
Order of submission	164	105
Minute entries showing filing of briefs	164	105
Excerpts from appellees' brief	165	105
Appellees' assignment of cross-errors	166	106
Minute entries showing filing of request for oral argument, etc. ..	168	107
Order setting cause for oral argument	169	107
Opinion, Shake, J., and judgment	171	108
Appellants' petition for rehearing	177	111
Appellees' petition for rehearing	181	113
Minute entries showing filing of briefs	185	115
Order denying petitions for rehearing	186	115
Praecept for transcript of record	187	116
Clerk's certificate	189	
Petition for appeal	190	116
Assignments of error	193	118
Bond on appeal	196	
Order allowing appeal	199	120
Citation	201	
Praecept for transcript of record	202	121
Clerk's certificate	203	
Statement of points to be relied upon and of parts of record to be printed	204	122
Order noting probable jurisdiction	208	125

[fol. a-4] [File endorsement omitted]

[fol. 5] [Caption omitted]

[fol. 6] [File endorsement omitted]

IN THE SUPREME COURT OF INDIANA

Appeal from the Marion Supreme Court, Room Three

Cause No. 27767

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M.
Clifford Townsend, Joseph M. Robertson and Frank G.
Thompson, as and constituting the Department of Treas-
ury of the State of Indiana, Appellants

VS.

INTERNATIONAL HARVESTER COMPANY, and INTERNATIONAL
HARVESTER COMPANY OF AMERICA, Appellee

APPELLANTS' ASSIGNMENT OF ERROR—Filed August 27, 1942

The appellants say there is manifest error in the pro-
ceedings and judgment of the Court below in this to-wit:

1. The Court erred in overruling the appellants' Motion
for a New Trial which motion assigned as grounds therefor:

"1. The decision of the Court is not sustained by suf-
ficient evidence.

"2. The decision of the Court is contrary to law."

Wherefore, the appellants respectfully pray that the
judgment below be reversed.

[fol. 7] (Signed) George N. Beamer, The Attorney
General; Joseph P. McNamara, Deputy Attorney
General; David I. Day, Jr., Deputy Attorney Gen-
eral; Byron B. Emswiller, Deputy Attorney Gen-
eral.

[fol. 8] IN THE SUPERIOR COURT, MARION COUNTY, STATE
OF INDIANA, ROOM 3

No. B-6198

INTERNATIONAL HARVESTER COMPANY, and INTERNATIONAL
HARVESTER COMPANY OF AMERICA, Plaintiffs,

vs.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA: M.
Clifford Townsend, Joseph M. Robertson and Frank G.
Thompson, as and constituting the Department of Treas-
ury of the State of Indiana, Defendants

COMPLAINT—Filed August 17, 1939

The International Harvester Company and the International Harvester Company of America complain of the Department of Treasury of the State of Indiana, and of M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, residents and citizens of the State of Indiana, as and constituting the Department of Treasury of the State of Indiana, as follows, to wit:

Said International Harvester Company is a corporation of the State of New Jersey with general offices at 180 North Michigan Avenue, Chicago, Illinois.

The International Harvester Company of America is a corporation of the State of Wisconsin with general offices at 180 North Michigan Avenue, Chicago, Illinois.

Both said corporations have been admitted to do business and have done business in the State of Indiana for many years.

In 1935 the International Harvester Company of America [fol. 9] purchased from the International Harvester Company the products manufactured by the latter Company, and sold them in the United States through its selling branches to dealers, who sold to the public. The International Harvester Company of America also made some sales itself direct to the public.

On December 31, 1935 the International Harvester Company of America sold all of its inventories and receivables in all states of the United States, except Wisconsin, to the International Harvester Company and ceased doing busi-

ness in Indiana and other states except in Wisconsin, where it remained in business. In 1936, accordingly, the entire manufacturing and selling business in Indiana and in other states, except Wisconsin, was conducted by the International Harvester Company.

From the inception of the Indiana Gross Income Tax on May 1, 1933 to the present time, the International Harvester Company and the International Harvester Company of America, under authority from the Indiana Gross Income Tax Division, have filed consolidated gross income tax returns with the State of Indiana. In 1936, however, all the sales and taxes thereon were those of the International Harvester Company.

The International Harvester Company is engaged in the business of manufacturing and selling agricultural implements and agricultural machines of all kinds, tractors, cream separators, stationary engines, and kindred lines, repairs for such articles, binder twine, and also motor trucks.

In 1935 and 1936 the International Harvester Company had, and at the present time has, manufacturing plants in Chicago, East Moline, Rock Falls, Rock Island and Canton, Illinois; in Springfield, Ohio; Auburn, New York; Chattanooga, Tennessee; Milwaukee, Wisconsin; New Orleans, [fol. 10] Louisiana; and Fort Wayne and Richmond, Indiana.

The business locations in Indiana are the same today as in 1935 and 1936, except that in 1938 the International Harvester Company began operating a new plant in Indianapolis for manufacturing motors for motor trucks and harvester-threshers. The International Harvester Company has a plant in Fort Wayne, Indiana, known as the Fort Wayne Works, International Harvester Company, which manufactures motor trucks. It also has a plant in Richmond, Indiana, known as the Richmond Works, International Harvester Company, which manufactures seeding machines and other light tillage implements and machines.

The International Harvester Company has more than 100 selling branches in the United States. It has selling branches in the State of Indiana at Indianapolis, Terre Haute, Fort Wayne and Evansville. It also has branches outside Indiana, making sales to purchases in Indiana, namely, at Louisville, Kentucky, Kankakee and Chicago, Illinois, and Cincinnati, Ohio.

The Company's goods are divided into its General Line goods and Motor Trucks. By "General Line" is meant all goods except Motor trucks. That is, the General Line includes agricultural implements and machines, tractors, cream separators, stationary engines and binder twine. In some cities there are separate General Line and Motor Trunk branches, and in other cities the branches are combined. Indianapolis has a General Line and a Motor Truck Branch. Evansville, Fort Wayne and Terre Haute have combined General Line and Motor Truck Branches.

The branches sell at wholesale to dealers, who resell to the public at retail. The branches also make sales of machines and implements at retail to customers in territories where the Company has no dealer representation. The branches also sell repairs at retail. Motor Trucks are sold both to dealers, who resell to the public, and by the Company direct through its branch house organization. Moreover, the Company has in Indiana 10 retail stores known as McCormick-Deering Stores, selling both its General Line and Motor Trucks at retail; and two Motor Truck Sub-branches in Indiana, selling motor trucks at retail.

The Company has general transfer warehouses in Chicago, and Moline, Illinois, Kansas City, Missouri, St. Paul, Minnesota, and Council Bluffs, Iowa, at which it maintains general stocks of its goods for ready shipment to its branches and dealers, and a motor truck general transfer warehouse at Elizabeth, New Jersey.

The general offices of the International Harvester Company are located in Chicago, Illinois. The Company has an Executive Department, a Manufacturing Department, a Purchasing Department, a Sales Department, and other departments, the heads of which are located at the General offices of the Company in Chicago, Illinois. The purchasing of materials and supplies for the operation of its manufacturing plants in the State of Indiana and other states is all managed and controlled by the Purchasing Department of the general office at Chicago, Illinois. The general policies of the Company are determined by the executive officers of the Company in Chicago, Illinois, the Board of Directors meets there, and the quantity of supplies to be purchased at each of its plants and the distribution to the selling branches of the goods manufactured at the plants, are determined by the general offices in Chicago, Illinois.

The territories of the selling branches have been assigned to them as the result of many years' experience of the [fol. 12] Company in the business. These territories are business units and frequently extend beyond the boundaries of the state in which the branch is located. The business not only of the plaintiffs but of other persons in Southeastern Indiana naturally gravitates to Cincinnati, in southern Indiana adjacent to Louisville it gravitates to Louisville, and in Kentucky adjacent to Evansville it flows into Evansville, in Illinois near Terre Haute it flows into Terre Haute, and in Indiana adjacent to Kankakee it flows into Kankakee, Illinois.

The branch at Indianapolis has 28 counties and part of another county in Central Indiana, and in 1935 and 1936 it also had one county, Darke County, in Ohio.

The branch at Evansville, Indiana, handles 16 counties in Kentucky and 14 counties in Illinois, in addition to 10 counties in southwestern Indiana. The branch at Fort Wayne handles 18 counties in northeastern Indiana, and in addition 5 counties in Ohio. The branch at Terre Haute handles 8 counties and part of another county in Indiana, and 12 counties and part of another county in Illinois. The Louisville branch, in addition to Kentucky territory, handles 11 counties in southern Indiana. The Kankakee branch, in addition to Illinois territory, handles 9 counties and part of another county in western Indiana. The Cincinnati branch, in addition to Ohio territory, handles 5 counties in Southeastern Indiana. The Chicago Motor Truck Branch, in addition to Illinois territory, handles part of Lake County, Indiana.

The Company does not have, and never has had, facilities in Indiana sufficient to serve all of its Indiana dealers and users. An extensive reorganization of the Company's business would be required in order that all of its sales to [fol. 13] Indiana dealers and users be handled by Indiana branches, and would result in an artificial and inefficient method of doing business, and would involve large additional expenditures.

One branch is not permitted to solicit business from a dealer or user living in the territory of another branch, and in the unusual case where a sale is made by a branch to a customer in the territory of another branch, the former branch will transfer credit for the sale to the latter branch.

The territories of the branches doing business in Indiana were established long before the Indiana Gross Income Tax took effect on May 1, 1933. There has been no change in the territories of the branches doing business in Indiana, except that in 1938 Darke County, Ohio, which had formerly been part of the territory of the Indianapolis branch, was transferred to the territory of the Columbus, Ohio, branch.

The transactions herein set forth were made in the plaintiffs' usual and long-established manner of doing business.

In the case of wholesale sales, which are sales to dealers who resell at retail to the public, it is the business practice of the plaintiff for a traveler from the branch in whose territory the dealer is located to solicit a contract with the dealer in the late fall for the ensuing year, in which the dealer orders his estimated requirements of the plaintiff's goods for such ensuing year. This contract is sent to the branch house for acceptance, and if agreed to, will be accepted by the Branch Manager. The contract is not effective until so accepted by the Branch Manager. Later from time to time the dealer will send instructions to the Company, specifying the shipments he desires made of the goods so ordered by him. Moreover, the dealer gives additional orders for goods to a Company traveler, or sends them in by mail to the Branch House.

In the case of such wholesale sales, the contract or order provides for shipment of the goods to the dealer's place of business. It is impossible, however, for a branch house to keep in stock sufficient goods to supply its dealers, and it is necessary to fill a large part of the dealers' orders by shipments direct from the factory or general transfer house of the Company direct to the dealer. Moreover, to save freight expense, it is the business practice of the Company to ship carload orders from the factory or transfer house of the Company direct to the dealers. In case such a carload shipment cannot be furnished from a given factory or transfer house, the shipment of the goods is made from the branch house to the dealer. The branch house stock is intended to supply emergency demands of dealers in the selling season when they cannot wait for shipment from the factory or general transfer house, and to supply dealers whose requirements are less than carload lots, and to supply dealers who come to the branch with their own trucks and

take their goods away. Shipment to dealers, therefore, may be made either by freight direct from the factory or transfer house to the dealer, from the branch house stock to the dealer, or the dealer may go to the factory or transfer house or branch house and take delivery himself. Accordingly, the contracts with dealers contemplate that a large portion of the shipments to the dealers will be made from the factories or transfer houses of the taxpayer in other states direct to the dealers, and a large portion of the shipments are so made.

In the case of retail sales, if the buyer is to take delivery [fol. 15] himself at the factory or branch house, it is the business practice for the order or contract so to state.

Many purchasers of the motor trucks manufactured at the Fort Wayne Works go to Fort Wayne themselves and drive the trucks away in order to save delivery expense. Many trucks are delivered to the purchasers by companies or persons performing driveaway services. Some trucks are delivered by freight direct from the factory to the purchasers. The branch house also delivers trucks out of the branch house stock.

The factories of the Company make no sales. The sales are all made by the selling branches. The selling branch solicits the order, accepts it, receives payment, and issues an order to the factory for delivery or shipment to the purchaser. The part of the factory in the transaction is merely the delivery of the article. In the case of the Fort Wayne Works, the Fort Wayne Works (which manufactures motor trucks) makes no sales of trucks, accepts no orders or contracts, receives no part of the purchase price of the trucks, but merely delivers the trucks as ordered by the branches.

The dealer or the user makes payment to the branch which sold him the goods. It is the business practice for the dealer to turn in to the branch in whose territory he is located notes from the users to whom he has sold goods, which notes will apply as direct credit on the dealer's indebtedness to the Company. The notes given in part payment for the Company's goods are paid to the branch of the Company which made the sale, or in whose territory the dealer is located. Each branch regularly remits to the General Office of the Company in Chicago, Illinois, all funds received from its sales.

[fol. 16] In each of the classes of sales hereinafter mentioned all sales, except where an article is sold entirely for cash, are made on conditional sales contracts under which the Company retains title until the last of the purchase price instalments is paid by the dealer or user as the case may be. The dealer, however, is permitted to resell in the ordinary course of trade for value received the goods sold to him on conditional sale contract. The sale by the dealer to the user, unless entirely for cash, is also a conditional sale, the purchase price being evidenced by conditional sale notes, and if, as stated above, the dealer turns in the user's notes as direct credit on his indebtedness, the Company retains title to the goods sold to the user until the user's notes are paid. A substantial majority of the sales to dealers and users are so made on conditional sale contracts.

The classes of sales on which the plaintiffs claim refund are as follows:

Class A: Sales by branches of the plaintiff located outside the State of Indiana to dealers and users residing in the State of Indiana. By user is meant the consumer who buys at retail. The goods in these cases were shipped from branches or general transfer houses or factories of the plaintiff outside Indiana to the purchasers inside Indiana. The sales in this class were made on orders solicited in Indiana by travelers from branches outside Indiana or on orders received by mail from the purchasers in Indiana and sent to the branches outside Indiana. The orders were accepted by branches outside Indiana.

It is the business practice of the plaintiff for the order or contract of sale to provide where delivery shall be made, [fol. 17] and in all cases in this class the parties contemplated, and the contract of sale provided, that delivery should be made by the branch outside Indiana to the purchaser in Indiana, by shipment from the factory, transfer house or branch house.

It is estimated that the percentage of goods of Indiana manufacture, sold by branches located outside of Indiana which made sales to purchasers in Indiana, was 2.81%. This percentage is lower than the general percentage of goods manufactured in Indiana, sold by branches doing business in Indiana, because it is estimated that there would be no motor trucks included in the sales in Class A. On this basis it is estimated that of the amount of \$2,224,421.70,

sales in Class A, the amount of \$62,506.25 were of Indiana manufacture and \$2,161,915.45 were of goods manufactured outside Indiana.

The sales in Class A consist of the following:

Retail sales in Class A		\$82,111.86
Tax at 1%		821.12
Wholesale sales in Class A	2,142,309.84	
Tax at $\frac{1}{4}\%$		5,355.77
Total	Sales	\$2,224,421.70
	Tax	\$6,176.89

Class B: Sales by branches of the plaintiff located outside Indiana to dealers and users residing outside Indiana, who took delivery of the goods themselves in the State of Indiana for the purpose of making the transportation at a less cost than by common carrier. The orders in this class were solicited from purchasers residing outside Indiana by travelers from a branch of the Company located outside Indiana, or were received by mail at branches outside Indiana from purchasers residing outside Indiana. The [fol. 18] orders and contracts were all accepted by branches located outside Indiana. The sales in this class were motor trucks manufactured at the Fort Wayne Works.

In the case of wholesale sales, the contracts or orders provide for the goods to be shipped by the Company to the buyer at the buyer's place of business. If the dealer desires to take delivery of the truck himself at Fort Wayne in order to save the difference between the cost of such transportation and the cost of shipment by freight or driveaway by the Company's employes or by a driveaway company to the dealer, it is the custom for him to notify the Company at the time he desires delivery.

In the case of retail sales, if the user desires to save delivery expense by driving the truck away himself, it is the business practice for the contract or order so to state.

The sales in Class B consist of the following:

Retail sales in Class B	\$382,088.04	
Tax at 1%		\$3,820.88
Wholesale sales in Class B	279,620.19	
Tax at $\frac{1}{4}\%$		699.05
Total	Sales	\$661,708.23
	Taxes	\$4,519.93

Class C: Sales by branches located outside Indiana to purchasers residing in Indiana, who took delivery of the goods themselves in Indiana for the purpose of saving the difference between the cost of transporting the goods personally and the cost of transportation by common carrier. The orders in this class were solicited by travelers of branches outside Indiana from purchasers residing in Indiana, or were received by mail by branches outside Indiana [fol. 19] from purchasers residing in Indiana. It is estimated that most of the sales in this class were of motor trucks manufactured at the Fort Wayne Works, and a small amount of goods manufactured by the Richmond Works, Richmond, Indiana.

In the case of wholesale sales, the contracts or orders provide for the goods to be shipped by the Company to the buyer at the buyer's place of business. If the buyer desires to take delivery of the goods himself, either at Fort Wayne or Richmond, in order to save the difference between the cost of such transportation and the cost of shipment by freight, or, in the case of motor trucks, by driveaway by the Company's employees or by a driveaway company to the dealer, it is the custom for the dealer to notify the Company at the time he desires delivery.

In the case of retail sales, if the user desires to save delivery expense by driving the truck away himself, it is the business practice for the contract or order so to state.

The sales in Class C consist of the following:

Retail sales in Class C	\$49,140.11	
Tax at 1%		\$491.40
Wholesale sales in Class C	65,845.97	
Tax at 1/4%		164.61
Total	Sales	\$114,986.08
	Taxes	\$656.01

Class D: Sales by branches of the plaintiff located in Indiana to dealers and users residing outside Indiana, who came to Indiana and took delivery of the goods themselves in Indiana for the purpose of making transportation of the goods personally at a lesser cost than by common carrier. [fol. 20] In this class the orders were received by travelers

from Indiana branches who solicited the purchasers outside Indiana, or were sent by mail to the Indiana branches from purchasers outside Indiana. The orders were accepted by the branches inside Indiana.

In the case of wholesale sales, the contracts or orders provide for the goods to be shipped by the Company to the buyers at the buyers' places of business. If the dealer desires to take delivery of the goods himself at the branch in order to save the difference between the cost of such transportation and the cost of shipment by freight to the dealer's place of business, it is the business custom for him to notify the Company at the time he desires delivery that he will come and get the goods himself.

In the case of retail sales, if the user desires to save delivery expense by calling for the goods himself, it is the business practice for the order or contract so to state.

On the basis that in 1935 and 1936 12.10% of the sales of the Indiana branches were goods of Indiana manufacture, of the total sales in Class D, \$138,666.13 would be goods of Indiana manufacture and \$1,007,335.04 goods manufactured outside Indiana.

The sales in Class D consist of the following:

Retail sales in Class D	\$54,206.77	
Tax at 1%		\$542.07
Wholesale sales in Class D	1,091,794.40	
Tax at $\frac{1}{4}\%$		2,729.49
Total	\$1,146,001.17	
Sales Taxes		\$3,271.56

[fol. 21] *Class E:* Sales by branches located in Indiana to dealers and users residing in the State of Indiana, where the goods were shipped by the seller from outside the State of Indiana and where the order or contract of sales specified that shipment should be made from a point outside Indiana to the purchaser in Indiana. In these cases the orders were solicited from purchasers residing in Indiana by travelers of Indiana branches, or the orders or contracts were received by mail by Indiana branches. The orders and contracts were accepted by branches in Indiana. The sales in this class were of goods manufactured outside the State of Indiana.

The sales in Class E consist of the following:

1935		
Retail Sales	\$1613.60	
Tax at 1%		\$16.13
Wholesale Sales	194,384.87	
Tax at $\frac{1}{4}\%$		485.96
Total taxes for Class E for 1935		\$502.09
1936		
Retail sales in Class E	none	
Tax		none
Wholesale sales in Class E	78,297.32	
Tax at $\frac{1}{4}\%$		\$195.74
Total tax for Class E for 1936		\$195.74

Class F: Sales by branches located in the State of Indiana to dealers and users residing in the State of Indiana where delivery was taken by such dealers and users per- [fol. 22] sonally outside the State of Indiana for the purpose of making the transportation at a lesser cost than by common carrier. In these sales the orders were solicited in Indiana by travelers from Indiana branches, or were received by mail by the Indiana branches from Indiana customers. The orders or contracts were accepted by Indiana branches. The sales in this class were of goods manufactured outside the State of Indiana.

It is estimated that more than 90% of the sales in this class consisted of motor trucks manufactured at the Company's plant at Springfield, Ohio, of which the dealers took delivery at the factory, and of goods of which the dealers took delivery at the Chicago Transfer House. In the case of wholesale sales, the contracts provide for shipment of the goods to the dealer's place of business, but if the dealer at the time of delivery desires to take delivery of the goods himself at the factory or the company's transfer house in order to save the difference between the cost of making the transportation himself and the cost of shipment by common carrier, it is the business practice for him to notify the Company at the time he desires delivery that he will take delivery of the goods himself.

The sales in Class F consist of the following:

1935

Retail sales in Class F	10,581.46	
Tax at 1%		\$105.81
Wholesale sales	155,577.87	
Tax at $\frac{1}{4}\%$		388.94
Total taxes for Class F for 1935		\$494.75

[fol. 23]

1936

Retail sales in Class F	\$3,122.55	
Tax at 1%		\$31.23
Wholesale sales in Class F	168,748.05	
Tax at $\frac{1}{4}\%$		421.87
Total taxes for Class F for 1936		\$453.10

Pursuant to audit by the Indiana Gross Income Tax Division of the Indiana Gross Income Tax Returns of the International Harvester Company, the said Indiana Gross Income Tax Division on June 5, 1939 served the plaintiff with Notices and Demands for additional Indiana Gross Income Taxes for the calendar years 1935 and 1936 in the total amount, including interest to June 7, 1938, of \$25,737.92.

On June 15, 1939 the taxpayer paid said amount of \$25,737.92 to the Indiana Gross Income Tax Division, under protest, however, reserving the right to make claim for refund and sue to recover the amount so paid on the ground that the additional assessments were illegal, unconstitutional and void because levied on transactions in interstate commerce, on business done outside the State of Indiana, and on Gross income derived from sources outside the State of Indiana, and therefore unauthorized, illegal and unconstitutional under the Commerce Clause and the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, and under the provisions of the Indiana Gross Income Tax Act.

On August 7th, 1939, the taxpayer, the said International Harvester Company, filed its Claim for Refund with said Indiana Gross Income Tax Division, claiming refund of the following amounts of taxes and interest so paid under

[fol. 24] protest on June 15, 1939, pursuant to said Notices and Demands:

Tax for 1935	\$6,234.32	
Interest on tax for 1935	1,820.42	
Total refund claim for 1935	\$8,054.74	
Tax for 1936	\$8,390.07	
Interest on tax for 1936	1,443.09	
Total refund claimed for 1936	9,833.16	
Total refund claimed for 1935 and 1936		\$17,887.90

Said Claim for Refund divided the taxes so paid pursuant to said Notices and Demands of June 5, 1939; into Classes A, B, C, and D, herein set forth. In addition, the taxpayer claimed refund for Class E for the year 1936 in the amount of \$195.74 and for Class F for the year 1936 in the amount of \$453.10, making the total amount claimed on said Claim for Refund \$18,536.74.

On January 30, 1939 the taxpayer filed its Claim for Refund for the year 1935 for said Class E in the amount of \$502.09, and for Class F in the amount of \$494.75.

Said Claims for Refund in the total amount of \$19,533.58 were denied by the Indiana Gross Income Tax Division on August 9, 1939.

The plaintiffs say, however, that the taxes so paid for which suit is brought herein, were illegal, unconstitutional and void for the following reasons, to wit:

(1) The gross receipts upon which the aforesaid taxes were predicated are gross receipts derived from business conducted in commerce between states of the United States, and such receipts, under the terms and provisions of Sec- [fol. 25] tion 6 (a) of the Gross Income Tax Act of 1933, and as amended in 1937, are exempt from taxation by the defendants. Plaintiffs further allege that if said Gross Income Tax Act, when construed according to its true intent, imposes a tax on the gross receipts of plaintiffs derived from their business conducted as described in Classes A, B, C, D, E and F, then said Act is invalid and void for the reason that such tax constitutes a regulation of, and a burden upon, interstate commerce and is in violation of

Section 8, Article I of the Constitution of the United States.

(2) The gross receipts upon which the aforesaid taxes were predicated are gross receipts derived from activities, business and sources outside the State of Indiana under the provisions of Section 2 of the Gross Income Tax Act of 1933 and as amended in 1937, and are exempt from taxation by the defendants. Plaintiffs further allege that if said Gross Income Tax Act, when construed according to its true intent, imposes a tax upon the gross receipts of the plaintiffs derived from their business conducted as described in Classes A, B, D, C, E and F, then said Act is invalid and void for the reason that the State of Indiana has no jurisdiction to impose a tax upon such gross receipts, and the levy of such tax is lacking in due process of law and is in violation of the Fourteenth Amendment of the Constitution of the United States.

(3) The taxes on such transactions as described in said Class A, B, C, D, E and F, are levied on the entire gross receipts from such sales, and the State of Indiana did not segregate or seek to limit the tax to the activities carried on within the State, namely to the proportion of the gross [fol. 26] receipts which might properly be considered as arising from a source in Indiana. If said Gross Income Tax Act, when construed according to its true intent, imposes a tax upon said entire gross receipts, derived from the business conducted as described in Classes A, B, C, D, E and F, then said Act is invalid and void for the reason that the State of Indiana has no jurisdiction to impose a tax upon such gross receipts, and the levy of such tax is lacking in due process of law and is in violation of the Fourteenth Amendment of the Constitution of the United States.

Wherefore, plaintiffs pray for judgment in the amount of \$19,533.58 with interest at 6% per annum from the dates of payment by plaintiffs as hereinabove set forth, and for all proper relief in the premises.

Baker, Daniels, Wallace & Seagle; Warrack Wallace
and Paul N. Rowe, Edward R. Lewis, Attorneys
for Plaintiffs.

[fol. 27] IN SUPERIOR COURT OF MARION COUNTY

SUMMONS—Issued August 17, 1939

The State of Indiana, to the Sheriff of Marion County,
Greeting:

You are hereby commanded to summon Department of Treasury of the State of Indiana: M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson as and constituting the Department of Treasury of the State of Indiana, to appear before the Judge of the Superior Court of Marion County, Indiana, on the 5th day of September, 1939, being the 2nd Judicial day of the September Term, 1939, of said Court, which term commences at the Court House in the City of Indianapolis on the first Monday in said month and year last above named then and there to answer the complaint of International Harvester Company and International Harvester Company of America and you are further commanded to serve a copy of the complaint in this case on said Department of Treasury of the State of Indiana, which copy of complaint is attached to the copy of this summons to be served on said Department of Treasury, and have you then and there this writ.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Superior Court, at my office in the City [fol. 28] of Indianapolis, the 17th day of September, 1939.

Charles R. Ettinger, Clerk Superior Court Marion Co.
(Seal.)

SHERIFF'S RETURN

Came to hand 1939 August 17 P. M. 3:14 and served the within named Department of Treasury of the State of Indiana by reading this writ to and within the hearing of J. M. Robertson, Treasurer as Chief Administrative Officer of the Department of Treasury of the State of Indiana and delivering to him true copies of the same.

Aug. 18, 1939.

Al Feeney, Sheriff of Marion County, Ind. Per Bayt,
Deputy.

and served this writ by reading to and within the hearing of the within named M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson and delivering to them a true copy of the same.

Al Feeney, Sheriff of Marion County, Ind. Per Bayt,
Deputy.

[fol. 29] IN SUPERIOR COURT OF MARION COUNTY

[Title omitted]

ANSWER IN GENERAL DENIAL—Filed September 5, 1939

Come now the defendants, Department of Treasury [fol. 30] of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson, as and constituting the Department of Treasury of the State of Indiana, and for answer to the plaintiff's complaint the said defendants, and each of them, deny each and every allegation thereof.

Omer Stokes Jackson, the Attorney General Joseph P. McNamara, Deputy Attorney General; Attorneys for the Defendants.

IN SUPERIOR COURT OF MARION COUNTY

[Title omitted]

ORDER SETTING CAUSE FOR TRIAL—October 27, 1939

It is ordered by the court that the above entitled cause be and the same is hereby set for trial, before the court, on November 7, 1939.

Russell J. Ryan, Judge.

[fol. 31] IN SUPERIOR COURT OF MARION COUNTY

[Title omitted]

ORDER OF SUBMISSION—July 5, 1941

Come now the parties and by counsel, and on motion of the plaintiff the depositions of John L. McCaffey and A. T. Wollen are hereby published.

And this cause is now submitted to the court for trial, and the evidence being heard, the court now takes this cause under advisement.

Russell J. Ryan, Judge.

IN SUPERIOR COURT OF MARION COUNTY

[Title omitted]

JUDGMENT—April 29, 1942

[fol. 32] Come now International Harvester Company and International Harvester Company of America, the plaintiffs in the above entitled cause, by their attorneys of record, and come now the defendants, Department of Treasury of the State of Indiana (Gross Income Tax Division) and Gilbert K. Hewit, the Director of the Gross Income Tax Division of the Department of Treasury by their attorneys of record, said defendants being the successors in office to the Department of Treasury of the State of Indiana and its members, who were first named as defendants herein, and this cause, being now at issue, by agreement of the parties is now submitted for trial without the intervention of a jury: and

The court having considered the pleadings and evidence consisting of a stipulation of facts agreed to by all of the parties and the depositions of witnesses, and having heard the arguments of counsel and being duly advised in the premises, now finds for the plaintiffs that plaintiffs are entitled to recover from defendants, with interests, all taxes paid by plaintiffs upon receipts from retail sales in Classes A, C and D, as set forth in plaintiffs' complaint and said stipulation (except the sum of \$3,856.16) heretofore refunded to plaintiffs by defendants upon sales in Class A (filled by shipments in carload lots), and now finds that plaintiffs are not entitled to recover from defendants any of the taxes paid by plaintiffs upon receipts from retail sales in Class E or upon receipts from wholesale sales in less than carload lots in Class E or, as stipulated by the parties upon sales in Class F, as set forth in said complaint and stipulation. [fol. 33] (The taxes on all sales in Class B, and upon wholesale sales in said Class A and said Class E filled by shipments in carload lots, have been heretofore refunded to plaintiffs by defendants, and the plaintiffs accordingly are not entitled to recover from defendants in this judgment any of said taxes so refunded.)

Now, Therefore, is is Ordered and Decreed that plaintiffs herein have and recover of and from defendants herein, Department of Treasury of the State of Indiana (Gross

Income Tax Division) and Gilbert K. Hewit, the Director of the Gross Income Tax Division of the Department of Treasury, and each of them, the following amounts:

(a) as refund of gross income taxes and interest paid by plaintiffs to defendants upon receipts from transactions in Class A, the sum of \$2,320.73 as taxes, and the sum of \$531.59, as interest paid thereon, or a total of \$2,852.32. (The sum of \$3,856.16, as agreed upon by the stipulation, has heretofore been refunded to plaintiffs by defendants on account of Class A transactions and is not included in the foregoing sums or involved in this judgment.)

(b) as refund of gross income taxes paid by plaintiffs to defendants upon receipts from transactions in Class C, the sum of \$656.01 as taxes, and the sum of \$162.66, as interest paid thereon, or a total of \$818.67.

(c) As refund of Gross Income Taxes paid by plaintiffs to defendants upon receipts from transactions in Class D the sum of \$3,271.56, as taxes, and the sum of \$751.40, as interest thereon, or a total of \$4,022.96.

[fol. 34] (d) Interest upon each of said sums of \$2,852.32, \$818.67 and \$4,022.96, at the rate of three per cent (3%) per annum from the date of payment of said sums by plaintiffs to defendants, namely, June 15, 1939, to the date of payment to plaintiffs by defendants under this judgment.

And it is further Ordered, Adjudged and Decreed that the plaintiffs are not entitled to recover from defendants on account of taxes collected from plaintiffs upon receipts from retail sales in Class E or upon receipts from wholesale sales in less than carload lots in Class E or upon receipts from sales in Class F.

And it is further Ordered, Adjudged and Decreed that the defendant's pay the costs of this action.

Entered this 29th day of April, 1942.

Russell J. Ryan, Judge.

[fol. 35] IN SUPERIOR COURT OF MARION COUNTY

[Title omitted]

MOTION FOR NEW TRIAL.—Filed May 6, 1942

[fol. 36] Comes now the defendants in the above-entitled cause and move the court for a new trial and for grounds therefor state:

1. The decision of the court is not sustained by sufficient evidence.
2. The decision of the court is contrary to law.

Department of Treasury of Indiana, et al., George N. Beamer, the Attorney General. Joseph P. McNamara, David I. Day, Jr., Byron B. Emswiller, Deputy Attorney Generals.

[fol. 37] IN SUPERIOR COURT OF MARION COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL, ETC.—JUNE 3, 1942

Come now the parties in the above entitled cause, and the defendants having heretofore filed their motion, reasons and grounds for a new trial herein as follows:

“Come now the defendants in the above entitled cause of action and move the Court for a new trial, and for grounds therefor, state:

1. The decision of the Court is not sustained by sufficient evidence.
2. The decision of the Court is contrary to law.”

which said motion having been duly submitted to the Court and the Court having been duly advised in the premises, such motion is now by the Court overrules, to which ruling the defendants at the time excepts.

And thereupon said defendants pray an appeal to the Supreme Court of Indiana and an appeal is granted to said defendants as prayed.

Said defendants request and are granted sixty (60) days in which to file all Bills of Exceptions.

Russell J. Ryan, Judge.

[fol. 38] IN SUPERIOR COURT OF MARION COUNTY

[Title omitted]

ORDER SETTLING BILL OF EXCEPTIONS—July 3, 1942

Come now the defendants and present their Bill of Exceptions No. 1, and the same is now signed, sealed, and certified to be correct and to contain all of the evidence given in this cause, and the same is now ordered to be filed by the Clerk and made a part of the record without copying, and the same is now filed by the Clerk and made a part of the Record.

Russell J. Ryan, Judge.

[fol. 39] IN SUPERIOR COURT OF MARION COUNTY

[Title omitted]

Bill of Exceptions—Filed July 3, 1942

APPEARANCES:

Plaintiffs: Baker, Daniels, Wallace & Seagle by Warrack Wallace.

Defendants: George N. Beamer, Attorney General of the State of Indiana, by Joseph W. Hutchinson and Joseph P. McNamara.

[fol. 40] Be It Remembered, That on the 5th day of July, 1941, the same being the 30th judicial day of the June Term, 1941, of the Superior Court of Marion County, State of Indiana, Room No. Three, the following proceedings were had in the above entitled cause, before the Honorable Russell J. Ryan, Judge of said Court, To-Wit:

The cause being at issue, the same came on for trial before the Court, without the intervention of a Jury, Baker, Daniels, Wallace & Seagle, by Warrack Wallace, appearing as counsel for the Plaintiff and George N. Beamer, Attorney General of the State of Indiana, by Joseph W. Hutchinson and Joseph P. McNamara, appearing as counsel for the Defendants.

And Be It Further Remembered, That before the trial was begun, for the purpose of facilitating and expediting the trial of said cause, said Judge required to be present,

Ruth Briscoe, official reporter of said court, to take down in stenotypy the oral evidence, including both questions and answers, and note all rulings of the Judge in respect to the admission and rejection of evidence, and the exceptions taken thereto, and the documentary evidence offered and introduced on the trial of said cause, the said Ruth Briscoe, having been, at the time of her appointment duly sworn to faithfully perform her duties as such official stenotype reporter, which said appointment and her official oath as such reporter, are of and among the records of said Court.

[fol. 41] And Be It Further Remembered, That said official reporter was present and took down in stenotypy the oral and documentary evidence given and offered upon the trial of said cause, including both questions and answers, and noted all objections made to the admission of evidence, all the rulings of the Court with respect to the admission and rejection of evidence, and the exceptions taken thereto.

And the said Defendants, having requested said official reporter to furnish them with a complete transcript of said evidence, objections, rulings of the Court thereon, and the exceptions taken thereto, including all documentary evidence, a typewritten transcript of the same was made by said reporter, which Typewritten Transcript Is In the Words and Figures Following, That Is To Say:

[fol. 42] Mr. Hutchinson (Atty. for Defs.):

The Parties now offer and read in evidence stipulation of certain facts which are agreed upon by the parties, which stipulation is in the words and figures following:

IN SUPERIOR COURT, MARION COUNTY, INDIANA

[Title omitted]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the facts hereinafter set forth shall be considered as facts proven under the issues in this cause with the same force and effect as though established by competent evidence introduced at the trial, namely:

[fol. 43] 1. The Defendant, Department of Treasury of the State of Indiana, is an executive-administrative division

of the State of Indiana, created by Chapter 4 of the Acts of the Indiana General Assembly of 1933, charged with the enforcement and administration of the Indiana Gross Income Tax Act of 1933, and that Act as amended in 1937.

2. Defendant M. Clifford Townsend is the duly elected, qualified and acting Governor of the State of Indiana, and is a member of the Board of the Department of Treasury of the State of Indiana. Defendant Joseph M. Robertson is the duly elected, qualified and acting Treasurer of the State of Indiana, and is the Chief Administrative Officer of the Department of Treasury of the State of Indiana, and is a member of the Board of the Department of Treasury of the State of Indiana. Defendant Frank G. Thompson is the duly elected, qualified and acting Auditor of the State of Indiana, and is a duly appointed qualified and acting member of the Board of the Department of Treasury of the State of Indiana. Defendants M. Clifford Townsend, Joseph M. Robertson and Frank G. Thompson together constitute the Board of the Department of Treasury of the State of Indiana, and as such are in charge of said The Department of Treasury.

3. Plaintiff International Harvester Company is a corporation duly organized and existing under the laws of the State of New Jersey, with its general offices at 180 North Michigan Avenue, Chicago, Illinois.

4. Plaintiff International Harvester Company of America, a corporation duly organized and existing under the laws of the State of Wisconsin, at all times covered by the [fol. 44] Complaint, maintained its general offices in the City of Chicago, Illinois. At all times covered by the Complaint it was a distributor of products manufactured by the International Harvester Company. All of the capital stock of the International Harvester Company of America was owned by the International Harvester Company. On December 31, 1939 the International Harvester Company of America was dissolved and all its assets distributed to the International Harvester Company, its sole stockholder.

5. The International Harvester Company of America was admitted to do business in the State of Indiana under the name of the Milwaukee Harvester Company, a Wisconsin corporation, on May 20, 1901. On May 29, 1902 there was

filed in the office of the Secretary of State of Indiana a certified copy of Certificate of Change of Name of said Milwaukee Harvester Company to that of International Harvester Company of America. Said International Harvester Company, a New Jersey corporation, was admitted to do business in the State of Indiana on the 11th day of June, 1920.

6. During the entire year 1935, the International Harvester Company of America, as a sales subsidiary of the International Harvester Company, and wholly owned by it, purchased from the International Harvester Company the products manufactured by the latter company, and the International Harvester Company of America through its selling branches in the United States sold such products principally to dealers, who in turn sold such products to the public. The International Harvester Company of America also made some sales of such products direct to the public and not through dealers.

[fol. 45] 7. On December 31, 1935 the International Harvester Company of America sold all of its inventories and receivables in all states of the United States, except Wisconsin, to the International Harvester Company and ceased doing business in Indiana and all other states except Wisconsin. Accordingly, during the entire year 1936 and all subsequent years the International Harvester Company alone conducted the manufacturing and selling business in Indiana and in all other states except Wisconsin. The selling activities and selling branches hereinafter referred to were those of the International Harvester Company of America during 1935, and during subsequent years were those of the International Harvester Company, sometimes referred to as the "Company".

8. From May 1, 1933 to Dec. 31, 1939, the International Harvester Company and the International Harvester Company of America, under authority from the Indiana Gross Income Tax Division, have filed consolidated Gross Income Tax returns with the State of Indiana, although in 1936 and subsequent years all the sales of goods and the taxes thereon were those of the International Harvester Company. It is agreed by the parties hereto that for all purposes of this cause, the International Harvester Company and the International Harvester Company of America shall

be treated as the same party, and that, if any amount shall be found by the Court to be owing to the Plaintiffs or either of them in this matter, such amount shall be paid to the International Harvester Company and the judgment herein shall so provide.

[fol. 46] 9. The International Harvester Company has been for many years, and is now, engaged in the business of manufacturing and selling agricultural implements and machines and kindred products, repair parts and replacements for such articles and motor trucks.

10. In 1935 and 1936 the International Harvester Company had, and at the present time has, manufacturing plants in Chicago, East Moline, Rock Falls, Rock Island and Canton, Illinois; in Springfield, Ohio; Auburn, New York; Chattanooga, Tennessee; Milwaukee, Wisconsin; New Orleans, Louisiana; and Fort Wayne and Richmond, Indiana.

11. The business locations in Indiana are the same today as in 1935 and 1936, except that in 1938 the International Harvester Company began operating a new plant in Indianapolis for manufacturing motors for motor trucks and harvester-threshers. The International Harvester Company had in 1935 and 1936, and now has, a plant in Fort Wayne, Indiana, known as the Fort Wayne Works, International Harvester Company, which manufactures motor trucks. It also had in 1935 and 1936, and now has, a plant in Richmond, Indiana, known as the Richmond Works, International Harvester Company, which manufactures seedling machines and other light tillage implements and machines.

12. The International Harvester Company had in 1935 and 1936, and now has, selling branches in the State of Indiana at Indianapolis, Terre Haute, Fort Wayne and [fol. 47] Evansville. It also had in 1935 and 1936, and now has, branches outside Indiana which make sales to purchasers in Indiana, such branches being located at Louisville, Kentucky; Kankakee and Chicago, Illinois; and Cincinnati, Ohio. In 1935 these selling branches were those of the International Harvester Company of America.

13. The Company's goods are divided into its General Line goods and Motor Trucks. By "General Line" is meant all goods except motor trucks. In some cities there

are separate General Line Branches and Motor Truck Branches, and in other cities the branches are combined. Indianapolis has a General Line Branch and a separate Motor Truck Branch. Evansville, Fort Wayne and Terre Haute have combined General Line and Motor Truck Branches.

14. The branches sell at wholesale to dealers, who resell to the public at retail. The branches also make sales of machines and implements at retail to customers in territories where the Company has no dealer representation. The branches also sell repair parts and replacements at retail. The Company sells motor trucks both to dealers, who resell to the public, and direct to the public through its branch house organization. Moreover, the Company has in Indiana ten retail stores known as McCormick-Deering Stores, located at the places designated in paragraph 18 hereof, selling both its General Line and Motor Trucks at retail; and two Motor Truck sub-branches in Indiana at Gary and South Bend, selling motor trucks at retail.

[fol. 48] The McCormick-Deering Stores are retail stores, each under the control of a branch house, as designated in said paragraph 18. On sales for cash, the McCormick-Deering Store completes the sale and delivery of the article itself. On sales for credit, the credit must be approved by the Branch Manager of the branch house under whose jurisdiction the McCormick-Deering Store is. These McCormick-Deering Stores are located in places where the Company was not able to obtain adequate independent dealer representation.

15. The Company in 1935 and 1936 had and now has warehouses in Chicago and Moline, Illinois, Kansas City, Missouri, St. Paul, Minnesota, and Council Bluffs, Iowa, which it calls general transfer warehouses and which are supply depots where it maintains general stocks of its goods for ready shipment to its branches and dealers during the selling season. The stocks of goods maintained at such supply depots are shipped thereto from the manufacturing plants. The goods kept at the supply depots are those in demand in the territory served by the supply depot. The Company also maintains a motor truck general transfer warehouse or supply depot at Elizabeth, New Jersey.

16. The respective territories of the Company's selling branches have been assigned to them by the Company.

Frequently such territories so determined by the Company extend beyond the boundaries of the state in which the branch house is located. The Company's branch at Cincinnati serves a company-designated territory in the southeastern part of Indiana, and parts of Ohio and Kentucky. The Company's branch at Louisville serves a company-designated territory in southern Indiana and a part of [fol. 49] eastern Kentucky. The Company's branch at Kankakee, Illinois, serves a company-designated territory in Illinois and in western Indiana. The Company's branch at Evansville serves a company-designated area which includes parts of southwestern Indiana, southeastern Illinois, and northern Kentucky. The branch at Terre Haute serves a company-designated area which includes part of western Indiana and eastern Illinois. The Chicago Motor Truck Branch serves a company-designated area which includes Chicago and the industrial and urban Calumet region of north-western Indiana. The branch at Fort Wayne serves a company-designated area which includes parts of northeastern Indiana and western Ohio. The branches at Indianapolis serve a company-designated area in central Indiana.

17. The territory assigned by the Company to the branches at Indianapolis comprises 29 counties and part of another county in central Indiana, and in 1935 and 1936 it also included one county, Darke County, in Ohio. The territory assigned by the Company to the branch at Evansville, Indiana, comprises 16 counties in Kentucky and 14 counties in Illinois, and in addition 10 counties in southwestern Indiana. The territory assigned by the Company to the Fort Wayne branch comprises 18 counties in northeastern Indiana, and, in addition, 5 counties in Ohio. The territory assigned by the Company to the branch at Terre Haute comprises 8 counties and part of another county in Indiana, and 12 counties and part of another county in Illinois. The territory assigned by the Company to the Louisville branch, in addition to Kentucky territory includes 11 counties in southern Indiana. The territory assigned by the Company to the Kankakee branch, in addition to Illinois territory, includes 9 counties and part of another [fol. 50] county in western Indiana. The territory assigned by the Company to the Cincinnati branch, in addition to Ohio and Kentucky territory, includes 5 counties in

southeastern Indiana. The Chicago Motor Truck Branch has assigned to it by the Company, in addition to Illinois territory a part of Lake County, Indiana. The territories as above defined by the Plaintiff existed without change in 1935 and 1936 and thereafter, with the single exception above noted.

18. The Company's business locations in Indiana in the years 1935 and 1936 were as follows:

Manufacturing Plants

Fort Wayne Works Fort Wayne, Indiana
(Manufacturing Motor Trucks)

Richmond Works Richmond, Indiana
(Manufacturing seeding machines and light
tillage implements.)

Selling Locations

Selling Branches	McCormick-Deering Retail Stores Under said Branches
Indianapolis—General Line Branch	Lafayette
Indianapolis—Motor Truck Branch	Logansport Muncie Richmond Rushville

[fol. 51]

Territory

Central Indiana and 1 County in Ohio, as follows:

Counties in Indiana:

Bartholomew	Hancock	Morgan
Boone	Hendricks	Owen (part)
Brown	Henry	Putnam
Carroll	Howard	Randolph
Cass	Johnson	Rush
Clinton	Madison	Shelby
Decatur	Marion	Tippecanoe
Delaware	Miami	Tipton
Fayette	Monroe	Union
Hamilton	Montgomery	Wayne.

County in Ohio:

Darke

Evansville—combined General Line and
Motor Truck Branch

Washington

Territory

Southwestern Indiana,
16 counties in Kentucky, and
14 counties in Illinois.

Counties in Indiana:

Daviess
Dubois
Gibson
Martin

Perry
Pike
Posey
Spencer

Vanderburg
Warrick

Counties in Kentucky:

Butler
Caldwell
Christian
Crittenden
Davies

Hancock
Henderson
Hopkins
Livingston
Lyon

McLean
Muhlenberg
Ohio
Trigg
Union Webster.

[fol. 52]

Counties in Illinois:

Edwards
Franklin
Gallatin
Hamilton
Hardin

Jefferson
Johnson
Massac
Pope
Saline

Wabash
Wayne
White
Williamson

Fort Wayne—combined General Line and
Motor Truck Branch

Decatur
Goshen
Kendallville

Territory

Northeastern Indiana, and
5 counties in Ohio

Motor Truck
sub-branch at
South Bend.

Counties in Indiana:

Adams
Allen
Blackford
DeKalb
Elkhart
Fulton

Grant
Huntington
Jay
Kosciusko
LaGrange
Marshall

Noble
St. Joseph
Steuben
Wabash
Wells
Whitley

Counties in Ohio:

Defiance
Mercer
Paulding
Van Wert
Williams

Terre Haute—combined General Line and
Motor Truck Branch

[fol. 53]

Territory

Western Indiana and
13 Counties in Illinois.

Counties in Indiana:

Clay	Parke
Fountain	Sullivan
Green	Vermillion
Knox	Vigo
Owen (part).	

Counties in Illinois:

Clark	Effingham
Clay	Fayette (part)
Coles	Jasper
Crawford	Lawrence
Cumberland	Marion
Douglas	Richland
Edgar	

19. The Company also had in the years 1935 and 1936 the following places of business outside Indiana which, in addition to making sales to customers outside Indiana, also made sales to customers in Indiana:

Branches outside Indiana having territory in Indiana and making sales to Indiana customers.

McCormick-Deering
Retail Stores under
said Branches

Louisville, Kentucky

Seymour, Indiana.

11 Counties in southern Indiana as follows:

Clark	Jefferson
Crawford	Jennings
Floyd	Lawrence
Harrison	Orange

[fol. 54]

Jackson	Scott
	Washington

Kankakee, Illinois**9 Counties and part of 1 County in western Indiana, as follows:**

Benton	Porter
Jasper	Pulaski
Lake (part)	Starke
LaPorte	Warren
Newton	White

Cincinnati, Ohio—Motor Truck Branch and
General Line Branch.

5 Counties in southeastern Indiana as follows:

Dearborn	Ripley
Franklin	Switzerland
Ohio	

Chicago Motor Truck Branch
Part of Lake County, Indiana.

Motor Truck sub-branch
at Gary, Indiana.

20. Each of the Company's branches is instructed by the Company not to solicit business from a dealer or user located in the territory of another branch. If delivery is made from the stock of another branch house, the sale is considered by the plaintiff to be a sale of the branch house in whose territory the dealer is located. In the case where a sale is made by a branch to a user in the territory of another branch, the former branch will transfer credit for the sale to the latter branch. In each such instance where the sale is made by a branch to a user who is located in territory assigned by the Company to another branch, the [fol. 55] branch effecting the sale approves the order, makes delivery or causes delivery to be made, and collects the sale price from the customer or, in the case of credit transactions, approves the credit and takes notes for the property so sold. The notes so received are then transferred to the branch in whose territory the purchaser is located, and credit given that branch for the cash received.

21. The territories of the Company's branches doing business in Indiana were established before the Indiana Gross Income Tax Act took effect on May 1, 1933. There has been no change since then in the territories assigned by the Company to the branches doing business in Indiana, except that in 1938, Darke County, Ohio, which had formerly been part of the territory assigned by the Company to the Indianapolis branch, was transferred to the territory assigned by the Company to the Columbus, Ohio, branch.

The International Harvester Company was organized in 1902 by purchase of the assets of the McCormick Harvester Company, The Deering Company, the Plano Manufacturing Company and the Warder, Bushnell & Glessner Company. Prior to 1902 there were branch houses of one or more of the predecessor companies located at Fort Wayne, Indianapolis, Terre Haute, Evansville, Cincinnati and Louisville.

Below is given a table showing the dates on which the Company's branch houses in Indiana were established and,

in the cases specified, the dates when they were discontinued:

[fol. 56]

Location	Branch House Established	
Fort Wayne	11/1/02	
Indianapolis G. L.	11/1/02	
Indianapolis M. T.	12/2/27	
Terre Haute	11/1/02	
Evansville	11/1/02	
Kankakee	11/1/03	
Cincinnati G. L.	11/1/02	
Cincinnati M. T.	1/3/28	
Louisville	11/1/02—Branch moved to New Albany 10/12/11. Back to Louisville	12/1/22
Chicago M. T.	1/1/17	
Richmond	11/1/03	Closed 9/1/32
South Bend	11/1/02	Closed 9/1/32

22. In the case of the Company's wholesale sales, which are sales to dealers who resell at retail to the public, it is the business practice of the Company for a representative from the branch in whose company-assigned territory the dealer is located to solicit an option, or contract, with the dealer in the late fall of each year, in which option, or contract, the dealer orders part and estimates the balance of his requirements of the Company's goods for the ensuing year. This option, or contract, is sent to the branch house for acceptance and, if deemed satisfactory, will be accepted by the Branch Manager, at such branch office in one of the cities heretofore named. The option, or contract, is not effective until so accepted by such Branch Manager. Later from time to time the dealer will send instructions to the Branch, specifying the manner and time he desires for [fol. 57] shipment to be made of the goods so optioned or ordered by him. Moreover, the dealer gives orders for additional goods from time to time to a Company representative, or sends such orders in by mail to the branch house. All such orders for additional goods are subject to acceptance by the Branch Manager at such branch house located in one of the cities designated herein, and are handled in the same manner and with the same effect as in the case of the goods specified in the option or contract. The pertinent provisions of the Company's options, or contracts, are set out in paragraphs 29, 30 and 31 hereof.

23. The Company's price books list 2327 different sizes and kinds of agricultural implements and machines, and 197 kinds and sizes of motor trucks; and there are 5670 different sizes and kinds of attachments for agricultural implements and machines and motor trucks, a total of 8194 items. To attempt to carry a complete stock of its full line at each branch house would require greatly increased warehouses. The branch house stock is intended to supply, so far as possible, the demands of dealers for certain of the popular items in the selling season, when they cannot wait for shipment from the factories or general transfer houses; to supply dealers whose requirements for such items are less than carload lots; and to supply dealers who come to the branch house with their own trucks and take the goods away.

24. In the case of retail sales, if the buyer is to take delivery himself at the factory or branch house, it is the Company's business practice for the order or contract so to state.

[fol. 58] 25. Many purchasers of the motor trucks manufactured at the Fort Wayne Works go to Fort Wayne and themselves drive the trucks away. This applies both to wholesale sales to dealers and retail sales to users.

26. Pursuant to the plaintiff's regulations, the factories of the plaintiff make no sales. The sales, both wholesale and retail, are all made by the selling branches. The selling branch solicits the order, accepts it, receives payment and issues an order to the factory for delivery or shipment to the purchaser. The function of the factory in the transaction is merely to manufacture the article, ship it by rail or, in some cases, by truck, or deliver it to the purchaser when he calls for it in person. For example, the Fort Wayne Works, which manufactures motor trucks, makes no sales of trucks, accepts no orders or contracts, and receives no part of the purchase price of the trucks, but delivers the trucks by rail or drive away company or to the customer personally, according as it receives instructions from the selling branch.

27. The dealer or the user makes payment to the branch or retail store which sold him the goods. It is the business practice for the dealer to turn in to the branch in whose

territory he is located notes from the users to whom he has sold goods, which notes will apply as direct credit on the dealer's indebtedness to the Company. The notes given in part payment for the Company's goods are paid to the branch of the Company which made the sale, or in whose territory the dealer is located. Each branch, regularly remits to the General Office of the Company in Chicago, Illinois, all funds received from its sales. 4

[fol. 59] 28. In each of the classes of sales hereinafter mentioned, all sales, except where an article is sold entirely for cash, are made on conditional sale contracts under which the Company retains title until the last of the purchase price installments is paid by the dealer or user, as the case may be. The dealer, however, is permitted to resell in the ordinary course of trade for value received the goods sold to him on conditional sale contracts. The sale by the dealer to the user, unless entirely for cash, is also a conditional sale, the purchase price being evidenced by conditional sale notes, and if, as stated above, the dealer turns in the user's notes as direct credit on his indebtedness, the Company retains title to the goods sold to the user until the user's notes are paid. Of the total sales, \$10,715,747.77, made in 1936 by the four Indiana branches (Indianapolis, Fort Wayne, Evansville and Terre Haute), conditional sale notes, retaining title, were received in part payment of the purchase price to the amount of \$7,243,938.23 or 67.60% of the total sales proceeds. The percentage of total sales which were made on conditional sales is considerably greater than 67.60% however, since a large amount of the cash received was in part payment of sales where conditional sale notes were taken for the balance of the purchase price. The amount of such cash could only be ascertained by an analysis of each sale made. The only sales which are not conditional sales are those wholly for cash. Ordinarily, repairs are sold solely for cash.

29. (a) The following is the form of Sale Contract for General Line Goods, executed by the International Harvester Company of America with a dealer in the year, 1935, and by the International Harvester Company with a dealer in 1936:

(Here follows 2 photolithographs, side folios 60-61.)



SALE CONTRACT AND PRICE SCHEDULE

DATED _____ 19__

TO

INTERNATIONAL HARVESTER COMPANY
OF AMERICA
(INCORPORATED)

The undersigned, the Purchaser, hereby orders of said Company the goods marked as ordered in the list made a part of this contract, and requests that the same be shipped

to _____

at _____

on or about the date or dates indicated herein.

In consideration of the acceptance of this order, the Purchaser agrees to all the terms, conditions and provisions of this contract, as follows:

1. To accept delivery of said goods at points of shipment, receive the same on arrival, pay all freight charges thereon from the f.o.b. point or points named in the price schedules, and settle for the same at the dates, terms, and prices designated in the price schedules attached hereto. The Purchaser shall pay for said goods in cash on or before the dates specified, and if not then paid, shall pay interest on such purchase price at the rate of _____ per cent per annum and shall at any time upon the Company's request execute and deliver a bankable note or notes for the purchase price of said goods or any of them, said notes to mature at the dates herein agreed upon for payment and to draw interest thereafter at the above named rate.

2. The title to all goods shipped under this contract, with right of repossession for default, is reserved by the Company until the Purchaser has made full payment in cash for all of said goods and for all notes given therefor. Prior to full settlement in cash the Purchaser shall have no right to sell or dispose of any goods delivered hereunder except for value received in the ordinary course of trade and upon the express condition that prior to the delivery of any of said goods to a customer, the Purchaser shall secure from said customer a full settlement in cash or good and bankable notes and that the proceeds of all resales shall be considered the property of the Company in lieu of the goods so sold and held in trust for it and subject to its order, as provided in paragraph four hereof, until all sums due under this contract have been fully paid. At any time on request the Purchaser will give the Company's representatives full information regarding goods on hand, goods sold and the proceeds thereof, to enable it to ascertain and enforce its reserved rights under this clause. Nothing herein shall release the Purchaser from payment for all goods ordered and delivered hereunder and after delivery to him said goods shall be held at his risk and expense in respect to loss or damage from any cause and taxes and charges of every kind.

3. **Warranty.** (On all goods covered by this contract except Farm Trucks and Wagons. Wagon warranty is given on page 158.) The Company will furnish the Purchaser with a supply of printed forms for use in reselling the goods ordered hereunder and containing written warranties applicable to the several kinds of goods. In all cases where the Purchaser gives his customer a written warranty in the form suggested, the Company will protect the Purchaser and stand back of him in giving such warranty. This agreement, however, is conditioned on the Purchaser giving the Company's Branch Manager prompt written notice of any claim or complaint by a customer. The Company shall be under no liability whatever except where a written warranty is given in said approved form without addition or alteration of any kind, and shall be released from all liability hereunder in case the Purchaser shall, without its consent, waive compliance by his customer with any of the conditions of said warranty. The Company reserves the right to change the form of warranty in any of said order blanks at any time. The net price (but no freight or express charge) of any parts which the Purchaser is liable to furnish and shall furnish a customer in fulfillment of any such warranty may be charged back to the Company, but in all such cases the broken or defective parts must be exhibited at settlement time to the authorized agent of the Company and returned to the Company, if requested. This agreement is given and accepted in lieu of all other warranties, express or implied.

4. Upon request of the Company at any time the Purchaser agrees to turn over, endorse and assign to the Company a quantity of customers' notes or, if notes are not available, then customers' accounts sufficient to fully cover and secure all indebtedness of the Purchaser hereunder, such notes and accounts to be held as collateral security to said indebtedness. Payment of said customers' notes and accounts at maturity is guaranteed by the Purchaser and presentation, demand, protest, notice of protest and diligence are waived both as to makers and endorser. In case of default in payment of any of said collateral notes or accounts, the Purchaser agrees to remit cash for full amount of same together with interest and collection charges within 15 days after maturity. All collections on collateral notes or accounts are to be credited on the note or notes or account of the Purchaser first becoming due. On payment of Purchaser's indebtedness in full, all collateral notes or accounts remaining in possession of the Company are to be returned.

5. The Purchaser further agrees that all repairs and extras for the goods specified, ordered and furnished hereunder shall be received and paid for at the prices quoted in the Company's latest repair price lists to dealers on the following terms:

Net cash two months from 1st day of the month succeeding month of shipment, with interest after maturity, subject to discount of 5 per cent for cash if paid on or before the 1st day of the month succeeding month of shipment. Purchaser to pay all transportation charges on same from point of shipment except that, if repairs are shipped from Branch Houses or Transfer points in or west of the states of Montana, Wyoming, Colorado or New Mexico, an additional charge of 10% will be made. The Purchaser agrees to order a sufficient quantity of repairs for all lines of goods handled hereunder to take care of the trade in the aforesaid territory during the term of this contract.

6. The Purchaser agrees to examine all goods on arrival and notify the Company of all claims on account of shortage, defective or damaged goods or parts, within ten days after receipt of goods, and failing so to do the Company is not to be held responsible therefor. The Company shall have a reasonable time in which to make good any shortage or defective or damaged goods or to furnish parts to replace defective parts for which it is responsible.

7. All shipments are to be routed as the Company may direct, and the Company will use its best efforts to make shipments on or before the dates specified, but it shall not be responsible for failure to ship goods on time or to fill orders, where it is prevented by act of God, or by fire or other elements, or by riots, strikes, labor disturbances, or by the law or the decree or judgment of any court, or if the demand for any goods shall exceed the Company's available supply, or by any cause beyond the Company's reasonable control; nor shall the Company be liable for any delay, damage or loss occurring after delivery of goods to carrier, and all claims for damage in transit shall be made direct by the Purchaser against carrier.

8. In addition to the goods now ordered, all goods heretofore or hereafter shipped to the Purchaser, between the dates of November 1, 1935, and October 31, 1936, both inclusive, shall be considered as sold under this contract, and subject to all of its provisions, except as different prices or terms have been or may be agreed upon at the time, and it is understood that the Company reserves the right to reject any orders for additional goods, or to change the prices and terms applicable thereto.

9. Cancellation or reduction in the amount of the original or any subsequent orders placed and accepted hereunder without the consent of the Company, or refusal to accept shipment of any goods in time for the 1936 selling season, shall be ground for termination of this contract by the Company and refusal to furnish any further goods hereunder, the Purchaser, however, remaining liable to settle for all goods previously shipped in accordance with the terms hereof.

10. The Dealer agrees to reimburse the Company for any and all sales or excise taxes, whether imposed by Federal, State or local laws, which it may be required to pay or to reimburse to others by reason of the manufacture, purchase or sale of any goods delivered under this contract. The amount of said tax may be billed as a separate item or included in the invoice price of the goods at the Company's option.

11. The prices quoted herein are not guaranteed to be effective after June 1, 1936, and goods shipped after that date shall be paid for at the Company's price in effect then in effect in Purchaser's territory.

12. In all cases where the attached schedule permit goods unsold at maturity date to be carried on extended terms to a subsequent year, it is understood that this is conditional on the prices on such carried-over goods being readjusted to conform with the Company's prices for similar goods in effect at the maturity date applicable to said goods.

13. It is understood that this order is taken subject to the acceptance of the Company's Branch Manager having charge of the district in which the Purchaser's principal place of business is located and that this contract contains the entire agreement between the parties with reference thereto, and that there shall not be any change in any of the prices, terms or conditions printed herein, unless such change is made and accepted in writing, by

sold Branch Manager. The copy of this contract retained by the Company shall be considered the original and shall control in case of any variation between it and the duplicate retained by the Purchaser. The Company's rights under this contract may be assigned to any affiliated Company. The Purchaser's rights under this contract shall not be assigned without the consent of the Company's Branch Manager. All indebtedness created under this contract shall be payable at the Company's Branch House named below.

Purchaser's
Signature _____

Witnesses { _____

(Traveler)

Accepted at _____

(FBI in Town
and State)

(Branch House)

19 _____

**INTERNATIONAL HARVESTER COMPANY
OF AMERICA**
(INCORPORATED)

By _____

(Branch Manager)

PRICE GUARANTEE

If the International Harvester Company of America should reduce its prices to dealers on any of the various classes of goods covered by this contract, on or before the cash discount dates for said class of goods, as stated in the terms schedule herein contained, it agrees to adjust to such lower basis the price of any complete machines of the class affected which were purchased under this contract and which remain unshipped or on hand unsold in the possession of the dealer at the time such price change becomes effective.

[fol. 62] (b) The following are the provisions for freight on General Line Goods in 1935 and 1936:

"Freight Delivery

Bagasse Carriers.....	F.O.B. Chattanooga, Tenn.
Cane Mills.....	F.O.B. Chattanooga, Tenn.
Fertilizer Distributor.....	F.O.B. Chattanooga, Tenn.
Juice Pumps.....	F.O.B. Chattanooga, Tenn.
Kettles, Cast Iron.....	F.O.B. Chattanooga, Tenn.
Sterling Trade Wagon Boxes.....	F.O.B. Goodyear, Miss.

Goods Listed Above Take Freight Delivery Indicated

The Freight Clause Below Applies to the Following Goods.

Binders—Corn	Headers	Seeders
Binders—Rice	Huskers and Shredders	Separators—Cream
Broadcast Fertilizer Loaders—Hay		Shellers—Corn
Distributor Milkers		Side Rake and
Drills—Grain	Mowers	Tedder
Dusters	Presses—Hay	Sowers—Lime
Engines	Rakes—Sulky	Spreaders—Manure
Ensilage Cutters	Rakes—Sweep	Spreaders—Lime
Grinders—Feed	Reapers	Stackers—Hay
Grinders—Knife	Rod Weeders	Tedders
Hammer Mills	Ronning Ensilage	Wagons and Farm
Harvesters—Push	Harvesters	Trucks

Shipments direct from Factory, F. O. B. Factory, but if freight paid is in excess of Chicago rate, will be adjusted to Chicago basis.

Shipments from Branch House or Transfer Point—F. O. B. point of shipment, with an amount added to cover cost of Handling and for advance charges equalling carlot freight, from Factory or Chicago, Ill., to point of shipment.

[fol. 63]

Beet Drills	Land Packers	Plow Packer
Beet Pullers	Listers	Potato Diggers
Cultivators, all kinds	Plows, Canton,	Potato Planters
Corn Planters and drills	All kinds and types	Ridge Busters
Corn and Cotton Drills	Plows, Chattanooga Disk	Rotary Hoe
Harrow Plow	Plow Press Drills	Soil Pulverizer
Harrows, all kinds and types		Stalk Cutters
		Tandem Attachments

Goods Listed Above Take the Following Freight Delivery

F.O.B. Branch House or Transfer Point.

Freight will be refunded on car lots ordered and shipped direct from factory.

MICRO CARD

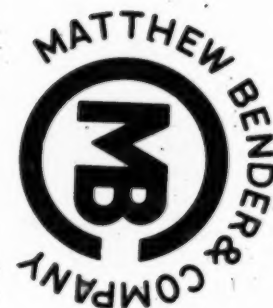
TRADE

MARK



22

2537



64



30. The Dealer's Motor Truck Contract for International Motor Trucks, effective in 1935 and 1936, provides in the "Order" clause as follows:

"1. Order. The Company hereby agrees to sell and the Dealer to buy, subject to the provisions of this contract, the International Motor Trucks and attachments listed below, to be delivered at points of shipment to be selected by the Company f. o. b. factory and paid for at the prices named below (less the discounts indicated) on sight draft attached to Bill of Lading.

"The prices quoted herein are not guaranteed to be effective after March 1, 1935, and goods shipped after that date shall be paid for at the Company's prices to dealers then in effect in Dealer's territory."

[fol. 64] Paragraph 3 of said contract, entitled "Shipping Instructions", is in words as follows:

"3. Shipping Instructions. The trucks ordered on this contract, for which shipping orders are attached hereto, are to be shipped to — at — in accordance with the following schedule of shipping dates:

Dec. Jan. Feb. Mar. Apr. May June July Aug. Sept. Oct. Nov.

C-1	_____
C-10	_____
C-20	_____
C-30	_____
C-35	_____
C-40	_____
C-50	_____
C-55	_____
C-60	_____
A-7	_____
A-8	_____
W-2	_____

Clause 25 of said contract, entitled "Approval of Contract," with the provision for signatures, is as follows:

"25. Approval of Contract. This contract shall not be binding on the Company until approved, in writing thereon, by its Branch Manager, and if not approved, all advance payments will be refunded. When

so approved, it shall be binding and conclusive on both parties.

International Harvester Company of America,
by — — —, Salesman.

Approved at — the — day of —. International Harvester Company of America.

[fol. 65] By — — —, Branch Manager.

— — —, Dealer, by — — —.

Paragraph 7 relating to "Additional Goods" reads as follows:

"7. Additional Goods. Any additional trucks of the models listed herein and attachments ordered and shipped to the Dealer during the term of this contract shall be considered as sold under the provisions of this contract except as otherwise provided at the time, it being understood that the Company may reject additional orders or change prices and terms at any time."

31. The dealer's Order for "Additional Goods," either General Line goods or Motor Trucks, is in the words and follows, to-wit:

"Order for Additional Goods

To International Harvester Company
(Incorporated)

_____ 19____
Post Office Date

Branch House

Ship to — Town — State — via — and charge to — Business Point, the following additional goods at the prices and terms and subject to conditions set forth in the sales contract for the current year now existing between us, including the title reservation clause which is reprinted on the back hereof.

(Sign here)

[fol. 66] Be sure all equipment desired is plainly specified.

Quantity	Ship About	Description

This order can be accepted only by the Company's Branch Manager.

Order taken by ———, Traveler.

32. The forms for retail sales of General Line Goods and of Motor Trucks, in effect in 1935 and 1936 are as follows:

(a) The form for retail order for General Line Goods by a user is as follows:

"Order for Goods

To —————

(Dealer)

—————

(Town) (State)

I hereby order of you the following goods:

No. Ordered	Size and Description	Price

to be delivered at your place of business on or about ———
 I agree to pay freight on same from ——— and settle on
 delivery as follows:

[fol. 67]

\$— Cash, \$— Notes, Payable _____

Then are clauses relating to interest on notes after maturity, and reimbursement by purchaser of any increases in sales and other taxes. The balance of the order form is as follows:

"_____ 19—

(Date)

(Purchaser's Signature)

(Post Office)

(R. F. D.)

(State)

(County)

(Township)

Purchaser lives _____ miles north, east, south, west of above P. O. Order taken by _____

Subject to acceptance by Dealer to whom order is addressed.

Accepted

(Date)

19—

By

(Give Purchaser a Copy of this Order)"

(b) The form for an order of motor trucks by a user is as follows, to wit:

"Order for International Motor Truck

To _____ Town _____ State _____

The Undersigned of _____ Post Office, County of _____ State of _____, hereby orders of you, subject to all conditions and agreements herein contained, the following described International Motor Truck (or trucks), to be [fol. 68] shipped on or about the — Day of _____ 19—, to

Chassis		Tire Size		Capacity of Truck
Quantity	Model	Wheel	Front Rear Type	Rated Maximum
Cab			Wheels	
	Base		Single	(including
			Duals	Body and
			Single	Load)
			Duals	Tons Lbs.
				Tons Lbs.

Equipment:

Chassis

Model Description of Body and other equipment

For which I (we) agree to pay the total sum of \$ _____
and _____, F. O. B. _____ as follows:

\$ _____ on the signing of this order (and if paid by check,
cashing or depositing the same shall not be considered as
an acceptance of this order), and the remainder of the pur-
chase price to be paid as follows upon delivery or tender
of said truck (or trucks):

Cash \$ _____, Notes \$ _____, Payable _____

and the following described property (give detailed descrip-
tion). One _____ Motor Truck, Model _____, Chas-is No.
_____, Engine No. _____

Then the contract sets out the various provisions as to reser-
vation of title, effect of delinquency in payment of notes,
a provision for warranty, and similar sales contract pro-
[fol. 69] visions. The concluding parts of the contract are
as follows:

"Note: If this order is addressed Order dated this _____
to the International Harvester Company, day of _____, 19____
it is subject to the written acceptance _____ Purchaser
of one of the Branch Managers. Pur- _____
chaser's deposit to be returned if not Order taken by _____
accepted _____"

Accepted _____ at _____

_____, Branch Manager.

33. (a) For the years 1935 and 1936 the Company paid
Gross Income Taxes to the Department of Treasury of
the State of Indiana as shown on the consolidated Gross
Income Tax Returns of the International Harvester Com-

pany and International Harvester Company of America, as follows:

1935			
Wholesale sales	\$4,547,141.98	Wholesale Tax ..	\$11,367.85
Retail sales	\$1,702,563.38		
Exemption	1,000.00		
Net retail sales	1,701,563.38	Retail Tax	17,015.64
		Total taxes	\$28,383.49
1936			
Wholesale sales	\$5,656,701.99	Wholesale Tax ..	\$14,141.76
Retail Sales	2,302,697.82		
Exemption	1,000.00		
Net Retail Sales	2,301,697.82	Retail Tax	23,016.98
		Total taxes	\$37,158.74

[fol. 70] (b) Of the above amounts, the Company has claimed refund only of the sum of \$996.84 for 1935 and of \$648.84 for 1936, or \$1,645.68 in all, which sums are included in the amount sued for herein, as Classes E and F, as set out in paragraph 34 hereof.

34. The taxes for which the Company claims refund, and has sued herein to recover, were paid on the gross receipts derived from the following classes of sales:

Class A. (a) Sales by branches of the Company located outside the State of Indiana to dealers and users located in the State of Indiana. By "user" is meant the consumer who buys at retail. The goods in this class were shipped from branches or general transfer houses or factories of the Company outside Indiana to the purchasers inside Indiana. The sales in this class were made on orders solicited in Indiana by representatives from branches outside Indiana, or on orders received by mail by the branches outside Indiana from the purchasers in Indiana. The orders were all accepted by branches outside Indiana. The sales proceeds were received by the branches outside of Indiana which made the sales.

(b) The sales in Class A consist of the following:

1935			
Wholesale sales	\$995,943.79	Tax	\$2,489.86
Retail sales	40,650.53	Tax	406.50

	1936		
Wholesale sales.....	1,146,366.05	Tax.....	2,865.92
Retail sales.....	41,461.33	Tax.....	414.61
[fol. 71]			
	1935 and 1936 Combined		
Wholesale sales.....	2,142,309.84	Tax.....	5,355.77
Retail sales.....	82,111.86	Tax.....	821.12
Totals.....	2,224,421.70		\$6,176.89

It is agreed that of the wholesale sales in Class A, the amount of \$717,079.68 in 1935 and the amount of \$825,382.80 in 1936, or a total amount of \$1,542,462.48 for the two years 1935 and 1936, are shipments of goods in carload lots, and that such sales are not subject to the Indiana Gross Income Tax, and that the Company is entitled to a refund of the tax on such sales, and that the judgment in this case shall so provide, unless such tax is sooner refunded.

The amount of taxes on such sales which the parties now agree are not subject to the Indiana Gross Income Tax and to which the Company is entitled to refund are for the year 1935 \$1,792.70 and for the year 1936 \$2,063.46, or a total of \$3,856.16.

Class B. (a) Sales by branches of Plaintiff located outside Indiana to dealers and users located outside Indiana, who took delivery of the goods themselves in the State of Indiana. The orders in this class were solicited from purchasers residing outside Indiana by representatives from a branch of the Company located outside Indiana, or were received by mail at branches outside Indiana from purchasers located outside Indiana. The orders and contracts were all accepted by branches located outside Indiana. The sales in this class were motor trucks manufactured at the Fort Wayne Works. The sales proceeds were received by the branches outside of Indiana which made the sales.

[fol. 72] (b) In the case of wholesale sales in this class, the contract or order provides for the goods to be shipped according to the terms of the contract, as set out in paragraphs 30 and 32 hereof. However, notwithstanding such provision for shipment in the contract or order, if the dealer desires to take delivery of the truck at Fort Wayne himself and to undertake transportation of the truck to its

destination in another state, it is the custom for him to notify the Company to that effect at the time he desires delivery, and the Company will comply with the dealer's wishes in that respect.

(c) In the case of retail sales in this class, if the user desires to make transportation of the truck to its destination in another state, and for that purpose to take delivery at Fort Wayne, it is the Company's business practice for the contract or order so to state.

The sales in Class B consist of the following:

1935			
Wholesale sales.....	\$118,091.49	Tax.....	\$295.23
Retail sales.....	105,499.26	Tax.....	1,054.99
1936			
Wholesale sales.....	161,528.70	Tax.....	403.82
Retail sales.....	276,588.78	Tax.....	2,765.89
1935 and 1936 Combined			
Wholesale sales.....	\$279,620.19	Tax.....	699.05
Retail sales.....	382,088.04	Tax.....	3,820.88
Totals.....	\$661,708.23	Tax.....	\$4,519.93

The parties now agree that the sales in Class B are not [fol. 73] subject to the Indiana Gross Income Tax, and that the Company is entitled to a refund of the tax on such sales in the total amount of \$4,519.93, and that the judgment in this case shall so provide unless such tax is sooner refunded.

Class C. (a) Sales by branches located outside Indiana to dealers and users residing in Indiana, who took delivery of the goods themselves in Indiana.

(b) The orders in this class were solicited by representatives of branches outside Indiana from purchasers residing in Indiana, or were received by mail by branches outside Indiana from purchasers residing in Indiana. The orders and contracts were accepted by branches outside Indiana. Payments of the sales proceeds were received by branches outside Indiana. The sales in this class were principally of motor trucks manufactured at the Fort Wayne Works, and a small amount of goods manufactured by the Richmond Works, Richmond, Indiana. In the case of whole-

sale sales, if the dealer desires to take delivery of the goods himself, either at Fort Wayne or Richmond, it is the custom for the dealer to notify the Company to that effect at the time he desires delivery, and the Company will make delivery accordingly. In the case of retail sales in this class, if the user desires to undertake transportation of the goods to their destination and for that purpose to take delivery at the factory in Indiana, it is the business practice for the contract or order so to state.

(c) The sales in Class C consist of the following:

1935			
Wholesale sales.....	\$33,833.47	Tax.....	\$84.58
Retail sales.....	33,064.74	Tax.....	330.65
[fol. 74]			
1936			
Wholesale sales.....	\$32,012.50	Tax.....	\$80.03
Retail sales.....	16,075.37	Tax.....	160.75
1935 and 1936 Combined			
Wholesale sales.....	65,845.97	Tax.....	164.61
Retail sales.....	49,140.11	Tax.....	491.40
Totals.....	114,986.08		\$656.01

Class D. (a) Sales by branches of the Plaintiff located in Indiana to dealers and users residing outside Indiana, who came to Indiana and took delivery of the goods themselves in Indiana. In this class the orders were received by representatives from Indiana branches who solicited the purchasers outside Indiana, or were sent by mail to the Indiana branches from purchasers outside Indiana. The orders or contracts were accepted and the sales proceeds were received by the Branch Managers at the branches located within Indiana.

(b) In the case of wholesale sales in this class, the contract or order provides for the goods to be shipped by the Company to the buyer under the provisions set out in paragraphs 29, 30, 31 and 32 hereof. However, if the dealer desires to take delivery of the goods himself at the branch or factory in Indiana, it is the business custom for him to notify the Company at the time he desires delivery that he will come and get the goods himself, and the Company will make delivery accordingly.

[fol. 75] (c) In the case of retail sales in this class, if the user desires to take delivery at the branch or factory in Indiana and to undertake the transportation of the goods to their destination in another state, it is the business practice for the order or contract so to state.

(d) The sales in Class D for the years 1935 and 1936 consist of the following:

1935			
Wholesale sales.....	\$544,902.16	Tax.....	\$1,362.26
Retail sales.....	21,024.71	Tax.....	210.25
1936			
Wholesale sales.....	546,892.24	Tax.....	1,367.23
Retail sales.....	33,182.06	Tax.....	331.82
1935 and 1936 Combined			
Wholesale sales.....	\$1,091,794.40	Tax.....	2,729.49
Retail sales.....	54,206.77	Tax.....	542.07
Totals.....	\$1,146,001.17		3,271.56

Class E. (a) Sales by branches located in Indiana to dealers and users residing in the State of Indiana, where the goods were shipped by the Company from outside the State of Indiana and where the order or contract of sales specified that shipment should be made from a point outside Indiana to the purchaser in Indiana. In these cases the orders were solicited from purchasers residing in Indiana by representatives of Indiana branches, or the orders or contracts were received by mail by Indiana branches. The orders and contracts were accepted by the Branch Manager at branches located within Indiana. Payments of the sales [fol. 76] proceeds were received by branches in Indiana. The sales in this class were of goods manufactured outside the State of Indiana.

(b) The sales in Class E consist of the following:

1935			
Wholesale sales.....	\$194,384.87	Tax.....	\$485.96
Retail sales.....	1,613.60	Tax.....	16.13
Total taxes for Class E for 1935.....			\$502.09

	1936		
Wholesale sales.....	78,297.32	Tax.....	195.74
Retail sales.....	None		None
Total tax for Class E for 1936.....			\$195.74

It is agreed that of the wholesale sales in said Class E, the amount of \$170,958.57 in 1935 and the amount of \$66,409.65 in 1936, or a total amount of \$237,368.22 for both said years 1935 and 1936, were shipments of goods in car-load lots, and that such shipments are not subject to the Indiana Gross Income Tax. It is agreed that the Company is entitled to refund of the taxes on such sales, and that the judgment in this case shall so provide, unless such tax is sooner refunded.

The amount of taxes on such sales, which the parties now agree are not subject to the Indiana Gross Income Tax and to which the Company is entitled to refund, are for the year 1935 \$427.40 and for the year 1936 \$166.02, or a total for the two years 1935 and 1936 of \$593.42.

[fol. 77] Class F. (a) Sales by branches located in the State of Indiana to dealers and users residing in the State of Indiana where delivery was taken by such dealers and users personally outside the State of Indiana. In these sales the orders were solicited in Indiana by representatives from Indiana branches, or were received by mail by the Indiana branches from Indiana customers. The orders or contracts were accepted and the sales proceeds were received by Branch Managers at branches located within Indiana. The sales in this class were of goods manufactured outside the State of Indiana.

(b) More than 90% of the sales in this class consisted of motor trucks manufactured at the Company's plant at Springfield, Ohio, of which the dealers took delivery at the factory, and of goods which the dealers took delivery at the Chicago Transfer House.

(c) In the case of wholesale sales, the orders or contracts provided for the goods to be shipped by the Company, subject to the terms specified in paragraphs 29, 30 and 31 of this Stipulation. However, if the dealer at the time of delivery desires to take delivery of the goods himself at the factory or the Company's Transfer House, it is the business practice for him to notify the Company at the time

he desires delivery that he will take delivery of the goods himself, and delivery is made accordingly.

(d) In the case of retail sales in this class, if the user desires to undertake transportation of the goods to their destination in Indiana and for that purpose to take delivery at the factory or Transfer House, it is the Company's business practice for the order or contract so to state.

[fol. 78] (e) The sales in Class F consist of the following:

1935.			
Wholesale sales.....	\$155,577.87	Tax.....	\$388.94
Retail sales.....	10,581.46	Tax.....	105.81
Total taxes for Class F for 1935.....			\$494.75
1936			
Wholesale sales.....	163,748.05	Tax.....	421.87
Retail sales.....	3,122.55	Tax.....	31.23
Total taxes for Class F for 1936.....			453.10

35. Since the filing of the Complaint in this cause, it has been agreed by and between the parties that the gross receipts described in Class F are subject to the Indiana Gross Income Tax, and that the Plaintiff is not entitled to recover the amount thereof, and the judgment in this case shall so provide.

36. (a) Because of the nature of Plaintiff's products, the sales' demand and sales' possibilities of such products are to a large extent seasonable. For example, planting equipment and accessories are normally sold in the period from November to and including the following June, and harvesting machines and accessories are normally sold during the period from November to and including the following August of each year. The Plaintiff, just prior to and throughout the applicable season in which there would normally be a demand for its products during 1935 and 1936, maintained at each branch in Indiana, and each branch outside Indiana selling to Indiana customers, stocks of the various types of machines and implements marketed in the territorial areas served by such branch, which stocks were [fol. 79] maintained to fill, so far as possible, less than car-load lot orders from its dealers and emergency orders from its dealers in the selling season when the dealers do not

want to wait for shipments from the Factory or transfer house.

(b) The parties estimate that during the years 1935 and 1936 there were stocks of the Plaintiff at its Indiana branches available at the time of the sales to fill 50% of the less than carload lot orders of Indiana purchasers referred to above in this Class A. The goods sold in the manner described in this item 36, amounting to 50% of the Class A less than carload sales, were sold in the normal course of business and in a manner of sale not adopted on account of the Indiana Gross Income Tax or for the purpose of avoiding any tax liability. In each instance in which such goods were sold by a branch outside Indiana, the goods were sold to a buyer residing in a part of Indiana lying in a trade area then, and for many years previous, served by such branch. Each trade area served by a particular branch has been established and maintained for the purpose of serving the residents in such area quickly and economically, and state boundaries were not considered in the establishment of such trade areas.

(c) Though it is estimated that in said 50% of said less than carload Class A transactions the articles sold and delivered by the outside branches could have been found in stock at the time of sale at one or more of the branches in Indiana, nevertheless, since the stock of each Indiana branch is intended only to supply less than carload lot orders received from purchasers in its territory, and such stock is frequently insufficient to take care of all such less than carload lot orders, it follows that over the period of an entire year for the Indiana branches to fill all less than [fol. 80] carload shipments on sales by branches made outside Indiana to Indiana residents, in addition to the less than carload lot orders from purchasers in their own territory, it would be necessary to keep stocks on hand at the Indiana branches far in excess of any stock usually kept on hand and much in excess of the existing storage capacity at the Indiana branches. To fill, by delivery from Indiana branches, orders from purchasers residing in Indiana but residing in the territory of a branch outside Indiana, would eliminate the use of part of the storage facilities then and now existing at such outside branches. Such practice, also, would in many cases involve delay to the customer, since the

branch outside of Indiana is the most convenient point for the storage of goods for buyers in its particular trade area. Such practice, also, would in many cases result in higher freight costs to the buyer as the less than carload lot freight rates from the outside branch to the buyer in its trade area would be less than the rate from the Ind. branch nearest to the buyer, and much less than such rate from an Indiana branch in some distant part of Indiana.

(d) Due to seasonal demands for particular items in different trade areas, it is the most efficient business practice to stock each branch with the items likely to be required there, and it would be undesirable and uneconomical to stock any branch with items not called for by purchasers within its area. It is desirable to stock a branch, whether it be in Indiana or outside Indiana, with items wanted by the buyers in its trade area so that they may see the thing which they wish to buy and may have prompt delivery.

37. (a) The defendants reserve the right to object to [fol. 81] the materiality to the issues in this case of the facts set out in paragraphs 27 and 28, and plaintiffs reserve the right to object to the materiality to said issues of the facts set out in paragraph 36 and 40 (j).

(b) It is hereby mutually stipulated and agreed that the Court shall take judicial notice of all of the Regulations issued by the Gross Income Tax Division of the Department of Treasury of the State of Indiana.

(c) It is agreed that any party or parties hereto may offer further evidence at the trial of this cause.

38. Pursuant to audit by the Indiana Gross Income Tax Division of the Indiana Gross Income Tax Returns of the Company, the said Gross Income Tax Division served the Company with notices and Demands for additional Indiana Gross Income Taxes for the calendar years 1935 and 1936 in the total amount, including interest to June 7, 1938, of \$25,737.92, divided as follows:

1935 tax	\$8,965.70	Interest	\$2,617.98	Total	\$11,583.68
1936 tax	12,077.00	Interest	2,077.24	Total	14,154.24

Grand Total

\$25,737.92

39. On June 15, 1939 the Company paid said amount of \$25,737.92 to the Indiana Gross Income Tax Division, under written protest, however, which written protest reserved the right to make claim for refund and to sue to recover the amount so paid, setting out as grounds thereof that the additional assessments were illegal, unconstitutional and void because levied on transactions in interstate commerce, on business done outside the State of Indiana, and on gross income derived from sources outside the State of Indiana, [fol. 82] and therefore unauthorized, illegal and unconstitutional under the Commerce Clause and the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, and under the provisions of the Indiana Gross Income Tax Act.

40. (a) On August 7th, 1939, the Company and said International Harvester Company of America filed their joint Claim for Refund with said Indiana Gross Income Tax Division, claiming refund of the following portions of the taxes and interest so paid under protest on June 15, 1939, pursuant to said Notices and Demands.

Additional tax for 1935	\$6,234.32
Interest on additional tax for 1935	1,820.42
Refund of tax and interest claimed for 1935	\$8,054.74
Additional tax for 1936	\$8,390.07
Interest on additional tax for 1936	1,443.09
Refund of tax and interest claimed for 1936	\$9,833.16

(b) Said Claim for Refund divided the taxes on which refund was claimed into Classes A, B, C and D, covering the taxes paid under protest on June 15, 1939.

(c) Said Claim for Refund also included a demand for refund of taxes paid in the class designated herein as Class E for the calendar year 1936 in the amount of \$195.74; and the class designated herein as Class F for the year 1936 in the amount of \$453.10.

(d) The total amount claimed on said Claim for Refund of August 7, 1939, therefore, was \$18,536.74.

[fol. 83] (e) Prior to the claim filed on August 7, 1939, the Company on January 30, 1939 had filed its Claim for Refund for the year 1935 for the class designated herein

as Class E in the amount of \$502.09, and for the class designated herein as Class F in the amount of \$494.75.

(f) The taxes for said Classes E and F, both for 1935 and 1936, were paid at the regular times the returns were due, and no demand was made on the Company for said taxes and no interest was included in the amounts paid by the Company.

(g) Below is given the amounts of tax for which recovery was asked in the Complaint in this cause for each of the classes of sales, and interest thereon for Classes A, B, C and D as claimed in said Claim for Refund:

		Tax		Interest	
Class A	1935.....	\$2,896.36		\$845.74	
	1936.....	3,280.53		564.25	
			\$6,176.89		\$1,409.99
Class B	1935.....	1,350.22		394.27	
	1936.....	3,169.71		545.19	
			4,519.93		939.46
Class C	1935.....	415.23		121.24	
	1936.....	240.78		41.42	
			656.01		162.66
Class D	1935.....	1,572.51		459.17	
	1936.....	1,699.05		292.23	
			3,271.56		751.40
Class E	1935.....	502.09			
	1936.....	195.74			
			697.83		
Class F	1935.....	494.75			
	1936.....	453.10			
			947.85		
[fol. 84]					
Total Taxes.....		\$16,270.07		Interest	\$3,263.51

By this Stipulation, the amounts of tax are reduced to the following amounts for each of said classes:

		Tax originally claimed	Eliminated by stipulation	Net Amount in contest	Remaining
Class A	1935.....	\$2,896.36	\$1,792.70	\$1,103.66	
	1936.....	3,280.53	2,063.46	1,217.07	\$2,320.73
Class B	1935.....	1,350.22	1,350.22		
	1936.....	3,169.71	3,169.71		
Class C	1935.....	415.23		415.23	
	1936.....	240.78		240.78	656.01
Class D	1935.....	1,572.51		1,572.51	
	1936.....	1,699.05		1,699.05	3,271.56
Class E	1935.....	502.09	427.40	74.69	
	1936.....	195.74	166.02	29.72	104.41
Class F	1935.....	494.75	494.75		
	1936.....	453.10	453.10		
with interest.....					\$6,352.71

(h) Said Claims for Refund, in the total amount of \$16,270.07 taxes and \$3,263.51 interest, total \$19,533.58, were denied on August 9, 1939 by said Gross Income Tax Division, and Plaintiffs were so notified in writing.

(i) Plaintiffs then gave notice to said Defendants of their intention to bring, and have brought this suit, pursuant to the statutory provisions pertaining thereto, to recover said taxes in the total amount of \$19,533.58.

(j) The gross receipts involved in this suit for refund were not taxed, and were not used as the measure of any tax assessed, in any other jurisdiction than the State of Indiana, and no tax has been paid by the Plaintiffs to any [fol. 85] taxing jurisdiction other than the State of Indiana upon these identical gross receipts or which was measured by them.

Dated July 5, 1941.

(Signed) Warrack Wallace, Edward R. Lewis, Attorneys for Plaintiffs, George N. Beamer, The Attorney General; Joseph W. Hutchinson, Deputy Atty. Gen.; Joseph P. McNamara, Deputy Atty. Gen., Attorneys for Defendants.

[fol. 86] The Plaintiffs, in order to maintain the issues in their behalf, offered and introduced the following evidence, to-wit:

Mr. Wallace (Atty. for Plfs.):

The Plaintiffs Exhibit B is offered in evidence, being depositions of John L. McCaffrey and A. T. Woller. No objection.

Thereupon, Exhibit B, was introduced and read in evidence and is in the following words and figures, to-wit:

PLAINTIFFS' EXHIBIT "B"

IN THE SUPERIOR COURT OF MARION COUNTY

[Title omitted]

[fol. 87]

DEPOSITIONS

Depositions of John L. McCaffrey and A. T. Woller, witnesses produced and sworn on behalf of the plaintiffs in the above-entitled cause, notice being waived by agreement

of the parties, before Roy de Vincent Cox, a notary public for DuPage County, Illinois, on Tuesday, June 18th, A. D. 1940, at the hour of 1:30 o'clock in the afternoon, in the offices of International Harvester Company, Harvester Building, 180 North Michigan Avenue, Chicago, Illinois.

APPEARANCES:

[fol. 88] Mr. Edward R. Lewis, and Mr. Warrack Wallace, Appeared for plaintiffs; Mr. Joseph P. McNamara, Appeared for defendants.

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Mr. McNamara: Before the beginning of the deposition, may we have this stipulation: That objections be made at the time the questions are asked without elaboration as to the grounds of the objection, and that the objection may be renewed and amplified at the time the deposition is read in evidence.

That will save time in taking the depositions.

Mr. Lewis: We will stipulate to that. Will the notary please swear the witness.

JOHN L. McCaffrey, a witness, called on behalf of the [fol. 89] plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Lewis:

Q. Will you state your name, residence and occupation?

A. John L. McCaffrey; residence, 6138 Kenwood Avenue, Chicago; vice president in charge of sales of the International Harvester Company.

Q. You were recently elected vice president, I believe?

A. Yes, on June 1st.

Q. Before that, you were sales manager, were you?

A. Director of sales for the United States and Canada.

Q. When did you start in with the Harvester organization? I believe you started with the International Harvester Company of America?

A. Yes, sir.

Q. In what year?

A. 1909.

Q. The International Harvester Company of America was a wholly-owned subsidiary of the International Harvester Company?

A. That is correct.

Q. Where did you first start in with the Harvester Company?

A. Cincinnati, 1909.

Q. In Cincinnati. How long did you stay in Cincinnati?

A. From 1909 to 1923.

Q. Then where did you go?

A. I came to Chicago.

Q. And have been here ever since in the general offices?

A. Yes, sir.

Q. What were your duties at Cincinnati, Mr. McCaffrey?

A. Well, I started there in the warehouse, warehouse [fol. 90] man, salesman, blockman and assistant branch manager.

Q. Just what do you mean by blockman?

A. A blockman has a certain specified territory of a number of counties, with a number of dealers that he oversees and directs.

Q. You say it was in 1923 that you came to Chicago?

A. Yes, sir.

Q. And in Chicago, what have your duties been?

A. Assistant district manager, district manager, domestic sales manager, director of sales and vice president, in charge of sales.

Q. There are five districts in the United States, is that right?

A. That is right.

Q. And you were district manager, that means you were in charge of one of those districts?

A. At different times, of two districts.

Q. Mr. McCaffrey, at the time you worked for the Harvester Company in Cincinnati, did the International Harvester Company of America distribute goods that were manufactured by the International Harvester to the nation?

A. Yes, sir.

Q. When did it start to do that?

A. 1935.

Q. Who took over the business then?

A. The International Harvester Company.

Q. At the end of 1935?

A. As I recall it, yes.

Q. Will you describe briefly the method of handling sales of the Harvester Company? Take first the general line, and by the general line is meant what.

A. Farm implements and tractors.

[fol. 91]. Q. Very well. Take the general line. How does the International Harvester Company distribute its general line of goods to the public?

A. Well, first, we have 109 various branch houses located in various places in the United States that handle the products through approximately eight thousand dealers, or something more than that; the goods are sold direct to the dealers and the dealers sell to the farmers. That is the way it is done in the general line.

Q. You say you had 109 branch houses in 1935 and 1936?

A. Yes, sir.

Q. And the branch houses would sell the farm implements, the tractor line, the general line to the dealers at wholesale and the dealers would then sell direct to the public?

A. That is correct. We have about 109 company stores, retail outlets of our own, located in various places which are operated by the company.

Q. Trade retail stores?

A. Trade retail stores.

Q. What are those called?

A. McCormick-Deering stores, eight selling companies.

Q. What do you mean by "selling companies"?

A. That is a regularly organized and capitalized company entirely separate corporation from the company. The Harvester Company owns a certain proportion of the shares of stock.

Q. A controlling share of the stock?

A. A controlling share of the stock.

Q. There are not any of those direct sales companies left?

A. There are still eight.

Q. How many were there in 1935 and 1936?

A. In 1935 and 1936, there were eight. I am wrong about [fol. 92] that previous answer. I think probably there are only four left.

Q. But there were eight in those years, 1935 and 1936?

A. Yes, sir.

Q. What was the purpose of establishing these company-owned retail stores, these McCormick-Deering stores, instead of having independent dealers?

A. The first reason was that in certain locations over the United States there were good towns, good markets for our goods where we were not able to find a satisfactory dealer at the time; and rather than allow the customers to go without service and ourselves to go without the opportunity of selling the goods, we opened our own business; and those stores from time to time have been sold to individuals and new stores have been started and sold again; so that is a sort of revolving retail outlet.

Q. How many of these McCormick-Deering stores were there in Indiana in 1935 and 1936?

A. Ten.

Q. Under whose supervision is the McCormick-Deering store?

A. That is under the supervision of the branch manager at the branch house in whose territory they are located.

Q. If a McCormick-Deering store makes a sale to a farmer—you have one of those stores at Seymour, Indiana?

A. Yes, sir.

Q. Say a farmer comes in and pays cash for the article, does the store have full control over the sale?

A. The McCormick-Deering store manager at the store.

Q. But if the farmer wants to buy an expensive machine and pay part cash and give a note or notes for the balance, who would pass on that credit?

[fol. 93] A. The credit manager at the branch house.

Q. The sale would not be approved until the branch house had approved the credit?

A. Exactly.

Q. But on cash sales, the McCormick-Deering sales manager would have the complete control?

A. Correct.

Q. Where are the general offices of the International Harvester Company?

A. Chicago, Illinois.

Q. And have been here for how long?

A. Since the organization of the company.

Q. What are the chief departments of the company?

A. Well, there is the purchasing department, the manufacturing department, sales, engineering, treasury, legal and accounting departments.

Q. Where are the heads of those departments, where do they have their offices?

A. In Chicago.

Q. In the head office in Chicago?

A. Yes, sir.

Q. Now, Mr. McCaffrey, who determines the change of policy of the company? Who determines, for instance, if the company decides to build a plant in Indianapolis for the manufacture of motors for motor trucks, who decides that?

Mr. McNamara: Of course, we object for the reason it is immaterial, irrelevant and does not tend to prove any material issue in the cause, nor to disprove any defense alleged.

[fol. 94] A. The executive officers of the company in Chicago.

Mr. Lewis:

Q. Who determines the question of the purchase of materials and supplies for the manufacturing plants in Chicago, in Indiana, and other points?

Mr. McNamara: That is objected to for the reason it is immaterial and irrelevant and does not tend to prove any material issue in the cause, nor to disprove any of the defenses alleged.

A. That is all managed and controlled by the purchasing department in their general offices in Chicago.

Mr. Lewis:

Q. And the question of prices at which goods will be sold is determined in the same way?

Mr. McNamara: The same objection, immaterial and irrelevant; does not tend to prove or disprove any material issue in the cause, nor to disprove any defense alleged.

A. That is determined by the executive departments in the general office in Chicago.

Mr. Lewis:

Q. Where do the board of directors meet?

A. In the Chicago general offices.

Q. Now, Mr. McCaffrey, you said, I think, there were 109 branch houses in 1935 and 1936?

A. Yes, that is correct.

Q. Where are the branches that are located in Indiana and were so located in 1935 and 1936?

[fol. 95] A. In Indianapolis, Fort Wayne, Evansville and Terre Haute.

Q. I do not expect you to remember all of the counties, and I am not asking for that much detail, but will you please describe briefly in a general way what the territories of those branches are? What general territories does the Indianapolis branch handle for instance?

A. The Indianapolis branch handles the central and southeast part of Indiana; not completely the southern part but the central and southeastern part.

Q. Does it include any territory outside of Indiana?

A. No.

Q. May I refresh your recollection—didn't it in 1935 and 1936?

A. Yes, it handled Darke County, Ohio.

Q. That was later changed to the Columbus, Ohio Branch?

A. Yes, sir.

Q. Generally, what territory does the Fort Wayne branch handle?

A. The Fort Wayne Branch handles the northeastern part of the State of Indiana and four or five counties in Ohio.

Q. And the Evansville Branch?

A. The southern end of Indiana and part of Kentucky.

Q. Any counties in Illinois?

A. Some counties in Illinois, yes.

Q. What about the Terre Haute territory?

A. Part in Indiana and part in Illinois, the southwestern part.

Q. What branch located outside of Indiana makes sales in Indiana?

A. Kankakee, Cincinnati and Louisville.

Q. Cincinnati has what territory, generally speaking?

A. Part in Ohio, part of Kentucky and five counties in Indiana.

Q. A few counties in the south part of Indiana?

[fol. 96] A. Yes, sir.

Q. And the Kankakee branch has what territory?

A. Part of Illinois, part of Indiana, northwestern corner.

Q. Does the Chicago Motor Truck branch have a territory in Indiana?

A. Yes, Lake County.

Q. What determines in general the location of a branch house city?

Mr. McNamara: To which we object on the ground it is irrelevant and immaterial and does not tend to prove or disprove any of the issues in the cause.

A. The territory of the company's branches has been assigned to them as a result of many years of being in the business. These territories are well established business and economic areas, and correspond to the areas as to local freight distribution and commerce as adopted and established by other lines of business and trade associations.

Q. Now, Indianapolis has a branch, of course?

A. Yes, sir.

Q. And there has been a branch there for many years?

A. That is correct.

Q. There has been a branch at Cincinnati for a good many years, also?

A. That is correct.

Q. What is the reason that Indianapolis was picked as a branch house city?

A. Because Indianapolis is a natural trading center for a certain radius of miles of counties and territory surrounding Indianapolis.

Q. What makes Indianapolis a trading center?

[fol. 97] Mr. McNamara: I object to that on the ground it is irrelevant and immaterial and calls for a conclusion of the witness.

Mr. Lewis: The witness has established that he has had many years of experience. Go ahead.

A. I think the natural trade established a city rather than the city establishing the trading center. That is the point I have always held. If it was not a natural trading center, it would not be there. The fact that people have come there over a period of years, a good many years, has made it a city. That is how it came to be a city.

Q. Now, Mr. McCaffrey, based on your experience since 1909 in the sales department of the Harvester Company

and the International Harvester Company of America, I will ask you this: Suppose the company should make a rule that all business in Indiana, that is, all sales to dealers in Indiana, and to customers in Indiana, should be handled from Indiana branches. In other words, suppose they would say that all dealers in southeastern Indiana who now go to Louisville should hereafter go to Evansville: that dealers in Southern Indiana, now in the territory of the Louisville branch, must deal with the Evansville branch; that dealers in Kentucky who are now in the territory of the Evansville branch must go to Louisville; that dealers in Southern Illinois, now in the territory of the Evansville branch, must go to an Illinois branch; that dealers in Indiana in the territory of the Kankakee branch must go to Terre Haute, and that dealers in Illinois, in the territory of [fol. 98] the Terre Haute branch must go to Kankakee. What would be the effect of that on the business of the company?

Mr. McNamara: To which we object, on the ground it is irrelevant and immaterial and does not tend to prove or disprove any of the material issues in this cause, or disprove any of the defenses alleged, and also that it calls for a conclusion of the witness.

A. Well, in the first place, it would raise the cost of distribution of our goods and make it inconvenient for our customers; and it would make the cost of goods both to the dealer and the farmer more expensive than now.

Also, it would not work, if you did that, for the reason that you cannot bring a customer with his money where you want him, because he will go where he wants to go. In other words, it is not a natural place for him to do business. So naturally he will not go there. So we would have a constant turmoil of trying to direct people where they should go instead of the natural place where they will go.

Mr. Lewis:

Q. Would that, in your opinion, carry out not only with the dealers, but with the farmers who go to the dealers? Would the farmers be, in your opinion, inclined to follow their natural bent and go to the dealer they wanted to go to no matter what the company did?

Mr. McNamara: That is objected to as incompetent, irrelevant and immaterial, since we are not here concerned [fol. 99] with the commerce, if any, of the dealers, but only the commercial activities of the International Harvester Company itself.

A. Yes, I am sure they would.

Mr. Lewis:

Q. Suppose a farmer out in Western Indiana who had formerly dealt with a dealer in Illinois, even if the company should decide that the branch in Indiana would sell to the dealer, the farmer might still go to his dealer in Illinois?

Mr. McNamara: That is objected to as irrelevant and immaterial; does not prove or disprove any of the material issues in this cause or disprove any of the defenses alleged, and also calls for a conclusion of the witness.

A. That is true.

Mr. Lewis:

Q. I think from October 12, 1911 to December 1, 1922, on account of some Kentucky litigation, the branch in Louisville was removed to New Albany, Indiana?

A. Yes, sir.

Q. Are you familiar with the effect that had on the company's business?

A. As far as I can recall it at this late date, the branch which was finally established across the river from Louisville was never a satisfactory location, so far as our customers were concerned, and they continually complained of having to go across the river there for the purpose of getting our goods.

[fol. 100] Q. How about the Indiana customers and dealers?

A. The Indiana people, so far as I know, they may have been partially satisfied, but it was not as convenient for them, or at least they told us it was not, as when they went to Louisville.

Q. Mr. McCaffrey, I understand that each branch house has a warehouse to keep goods for sale?

A. That is correct.

Q. Does the company keep at each branch house in Indiana a full line of its entire stock?

A. They keep a complete variety but not a complete stock.

Q. Will you please elaborate on that a little bit?

A. That means that the variety might be an individual machine of each kind that is salable in that territory; it is there for show to the customers, but a complete showing means that sufficient stock is not carried to supply all the trade in the territory.

Q. Have you any figures as to the total number of kinds of machines that the company has for sale?

A. I do not have that, but those figures are available.

Q. Do I understand your previous answer, Mr. McCaffrey, to mean that a branch might keep several different kinds of ploughs, but not each variety of each kind of plough?

A. It would probably keep a sample of each variety but not a stock sufficient to supply the entire area.

Q. It would keep a sample but could not keep, in your opinion, a complete stock?

A. That is correct.

Q. Do you know whether the price books of the company list 2,327 different sizes and kinds of agricultural implements?

A. I know it is somewhere around that number. I do not know the exact number.

[fol. 101] Q. Do you know the number of kinds of motor trucks we have?

A. No.

Q. Well, whatever the number of the different kinds and sizes of agricultural implements and machines, if it were such a number as 2,327, you mean that the branch house would not keep each one of those 2,327 kinds and sizes?

A. No, because each of those are not all salable in the same branch house territory.

Q. Suppose that the company should try to keep in each warehouse a stock of their full line, what would be the result? Would it require a greatly enlarged warehouse space?

Mr. McNamara: That is objected to as immaterial, calls for a conclusion of the witness and does not tend to disprove any of the issues.

A. It would require a much larger warehouse, considerably larger inventories and would add to the cost of distribution and the selling price of the goods.

Mr. Lewis:

Q. It would add to that materially?

A. Materially, I would say.

Q. Is there sufficient warehouse room at the manufacturing plants of the company to warehouse all the stock of finished goods they have made?

A. No.

Q. What is the policy of the factory, as fast as they get finished goods, what do they do with them?

Mr. McNamara: That is immaterial, calls for conclusion of the witness and does not tend to prove or disprove any [fol. 102] of the issues.

A. The goods are shipped to the transfer houses, branch houses, or to the dealers.

Mr. Lewis:

Q. The factories do not have room to keep all their finished stock, do they?

Mr. McNamara: The same objection, immaterial, calling for a conclusion of the witness and does not tend to prove or disprove any of the issues.

A. Not the entire stock, no.

Mr. Lewis:

Q. They keep it moving out to the transfer houses and branch houses?

A. Yes, sir.

Q. What are the transfer houses and where are they located?

A. The transfer houses are located at Minneapolis, Minnesota? Council Bluffs, Iowa, Kansas City and Chicago, Illinois. The transfer houses are located, first, for the purpose of getting the benefit of through traffic or rail to points beyond those transfers, and the stocks carried there after coming from the factory as an intermediate supply for the branch houses and the dealers.

Q. Then when a branch gets an order for a machine, it does not have in stock at the branch house, what does that branch do with the order in the normal course of business?

Mr. McNamara: The same objection, incompetent and immaterial, calling for conclusion of the witness and does not tend to prove or disprove any of the issues.

[fol. 103] A. The branch house would send the order to Chicago, and the distribution department would then determine the speed at which the goods must get there; they usually try to deliver them from the factory or one of these transfer houses.

Mr. Lewis:

Q. And that is the company's name, "transfer house," but it would not be incorrect to call them supply depots, is that right?

A. That is what they are, but we know them as transfer houses in the company.

Q. In the fall of the year, what is the business practice of the branches of the company with respect to their relations with the dealers for the ensuing business year?

A. Some time between October 31st and January 1st, we proceed to make a contract with our dealers for the succeeding year.

Q. In connection with that contract, the dealer may give an initial order for goods?

A. Yes, sir.

Q. In all cases?

A. Yes, he does, I would say in practically all cases, in a greater percentage of the cases.

Q. It might be that a dealer would have a pretty bad year and would have goods left over from the year before; what then?

A. If he has a sufficient inventory to carry on another year, we would write a contract to represent us the following year without additional goods.

Q. In your opinion, is that a rare case?

A. That is a very rare case.

Q. Suppose a dealer signs up with the company, say in [fol. 104] November of 1939, for example, and he makes an initial order, and along in February he tells the company he cannot take that initial order and wants to beg out of it; what do we do in that case?

A. If it is a good reason, we would give him an opportunity to do that. I mean, in a great many parts of the country, crop conditions are never known until sometime later in the year, after the contract is written, and if they have a total crop failure, as frequently happens in the northwestern part of the country, we naturally would not require the dealer to take a stock of goods that were unsalable for that reason.

Q. And that is because we would be loading them up with unsalable stuff and would be hurting the dealer and not helping ourselves?

A. That is it, exactly.

Q. Well, in case he does not give a good reason for the cancellation of the order, what then is our attitude?

A. Our contract gives us the privilege of shipping on the shipping date that is specified in the contract.

Q. Later on, Mr. McCaffrey, in the course of the year the dealer may send in additional orders for goods?

A. That is correct.

Q. And they go to the branch house, do they?

A. Yes, accepted at the branch.

Q. Does the dealer give a shipping order at that time with each additional order of goods?

A. That is right.

Q. Does he tell in the shipping order how he wants the goods shipped, where from?

Mr. McNamara: This is all immaterial and irrelevant, [fol. 105] calls for a conclusion of the witness and does not tend to prove or disprove any of the issues.

A. Subsequent orders are usually brought about by additional demands for goods, and they are usually shipped in the quickest way from whatever point available. For instance, ordinarily a man will specify in his contract a number of sizes of a certain given item needed for that season, and those goods are shipped. If the demand grows beyond that, he will send in a subsequent order which would naturally say, "Ship at once", because he is up to the season; and he can and does specify where the goods shall be shipped from, and also usually specifies in there that the goods are needed promptly and should be shipped in the quickest way.

Mr. Lewis:

Q. Is it customary for dealer to designate in his shipping order that he wants the goods shipped from the factory or transfer house?

Mr. McNamara: That is objected to as immaterial and irrelevant.

A. That frequently happens.

Mr. Lewis:

Q. It is a fact, is it not, Mr. McCaffrey, that the freight on shipments to a dealer from the factory or transfer house will be less and considerably less than if the goods are shipped to him from the branch house?

Mr. McNamara: To which we object as irrelevant and immaterial, does not tend to prove or disprove any issues in this cause, and calls for a conclusion on the part of the [fol. 106] witness as to whether or not the freight charges would or would not be great.

A. That is usually the case.

Mr. Lewis:

Q. Has it been your experience in your service with the company that the dealers to a large extent do designate they want the goods shipped either from the transfer house or factory instead of the branch house in order to save freight?

Mr. McNamara: To which we object, for the reason the witness has answered and stated that they wanted it shipped the quickest way, usually and this question would tend to bring out evidence to rebut what the witness has stated heretofore.

A. In car load lots, the dealer will always expect his goods to come from the factory or transfer house. In less than carload lots it does not make much difference to him where it comes from, and he usually specifies the branch house.

Mr. Lewis:

Q. When he has got a car load shipment, is it generally the custom of the dealer to ask for shipment from the transfer house?

Mr. McNamara: That is objected to as immaterial and irrelevant and calling for a conclusion of the witness, and does not tend to prove or disprove any of the issues in [fol. 107] this cause.

A. The factory or the transfer house.

Q. How about deliveries of motor trucks? The company has two motor truck plants, one at Fort Wayne, Indiana, and one in Springfield, Ohio?

A. Yes.

Q. And a good part of the delivery of motor trucks is done by drive-away?

A. Yes, sir.

Q. Drive-away by the company?

A. Drive-away by the company and by the customer, or by the dealer.

Q. By customer, you mean the consumer?

A. Yes, the user.

Q. Is it your experience that dealers usually will go to the Fort Wayne motor plant at Fort Wayne, and the Springfield plant at Springfield, whichever is more convenient to them, and then drive away the motor trucks they purchase in order to save expense?

Mr. McNamara: That calls for a conclusion of the witness as to why they do it.

A. They do that very frequently.

Mr. Lewis:

Q. If the dealer does not go to either Fort Wayne or Springfield to get the truck, how does the company deliver it to him, by freight or by drive-away?

A. The greater percentage of the trucks are delivered by drive-away.

Q. Does the company turn these over to the drive-away company?

A. Yes, sir.

Q. And makes a specified charge for that?
[fol. 108] A. A specified charge.

Q. In case the delivery is made from the branch house, the drive-away is made from the branch house, is there an additional charge for handling at the branch house?

A. At the branch house, there is an additional charge on the motor truck for assembling, handling and servicing, any trucks that go out through the branch house.

Q. Does the company's instructions permit the sale by a branch to a dealer in the territory of another branch?

Mr. McNamara: That is objected to as immaterial and irrelevant, and not tending to prove or disprove any of the issues in this cause.

A. No.

Mr. Lewis:

Q. Have you ever heard of a sale being made by a branch to a dealer located in the territory of another branch?

Mr. McNamara: The same objection immaterial and irrelevant, and not tending to prove or disprove any of the issues.

A. I don't recall it, except for one reason, there might be a shortage of stock in one branch house, and the goods would be taken from another branch house, but the actual sale would not be made there, while the delivery would be from some other branch.

Mr. Lewis:

Q. Supposing a dealer would want a machine, for instance, who was in the Cincinnati territory, and the Cincinnati branch would be out of stock and the Evansville branch might have it. The sale would be a Cincinnati sale?

[fol. 109] Mr. McNamara: The same objection incompetent and immaterial, not tending to prove or disprove any of the issues in the cause.

A. Yes, sir.

Mr. Lewis:

Q. But that would be very rare, would you say?

A. Yes, very rare unless there was a considerable shortage of goods.

Q. Suppose a consumer would go to a branch in a territory outside of the territory in which the customer is located for an item, would that branch make the sale?

A. They would transfer the sale to the branch in the territory in which the customer was located.

Q. Are such sales usual or frequent?

Mr. McNamara: The same objection, immaterial and irrelevant, not tending to prove or disprove any of the issues, or to disprove any defense alleged.

A. They are not usual and they are not unusual. They happen occasionally; for instance, at state fairs, or occasions of that kind where farmers might come in from a radius of some miles, come to the fair and buy.

Mr. Lewis:

Q. In case the branch did not have an article that the dealer wanted, the ordinary method would be to fill that from the factory or transfer house?

Mr. McNamara: Objected to as immaterial and irrelevant.

A. If it was available. If not, he would probably try to get the stock from some branch that did have it available:

[fol. 110] Mr. Lewis: I will ask the reporter to mark this map as Plaintiffs' Exhibit 1, for identification.

(Map marked as requested, Plaintiffs' Exhibit 1, for identification.)

Mr. Lewis:

Q. I show you this map, which has been marked as Plaintiffs' Exhibit 1 for identification, being entitled, "International Harvester Company-owned branches. Sales and service locations," and I will ask you what that is a map of?

A. A map of the various branch house territories of the entire United States; sales and service locations are designated by either a square dot or a round dot.

Q. The round dot is the branch house?

A. The branch house.

Q. And the square dot designates motor truck sales and service?

A. Yes, sir, or company stores.

Q. The territory in Indiana is handled by the branch in Indianapolis, that is correct?

A. Yes, sir.

Q. In the center?

A. Yes, sir.

Q. And Louisville in the southeast?

A. In the southeast.

Q. And Cincinnati?

A. The southeast corner; Terre Haute in the southwest corner; Kankakee in the northwest corner and Fort Wayne in the northeast corner; Evansville in the southwest; Chicago in the northwest corner, on motor trucks only (indicating on map).

Q. And this branch at Fort Wayne handles the northeast corner of Indiana and a few counties in Ohio?

[fol. 111] A. That is correct.

Q. Do you believe this map correctly shows the sales branches of the International Harvester Company in Indiana and doing business in Indiana?

Mr. McNamara: I object to that as calling for a conclusion of the witness.

A. I do.

Mr. Lewis: I will offer Plaintiffs' Exhibit 1, for identification, in evidence, and will ask the notary and the witness to identify it with their initials.

(Whereupon, Plaintiffs' Exhibit 1 for identification, was offered in evidence, and is attached hereto and returned herewith.)

Mr. Lewis: Will the reporter please mark this map as Plaintiffs' Exhibit 2, for identification?

(Map marked as requested, Plaintiffs' Exhibit 2, for identification.)

Mr. Lewis:

Q. I show you Plaintiffs' Exhibit 2, for identification, and will ask you what that is.

A. This is a key or a map of the key distribution areas as prepared by The Traffic World.

Q. Will you please look at that map and tell us what are the trade distribution areas marked for the State of Indiana?

Mr. McNamara: That is objected to as immaterial and irrelevant.

A. They are very similar to our own trade areas. For instance the Fort Wayne trade area as shown here is for the northeast corner, going over into Ohio for a few counties.

Cincinnati has a trade area here which goes over into [fol. 112] Indiana for a few counties.

The Louisville trade area as shown here goes over into Indiana and a part of Kentucky.

Evansville is shown as having part of Kentucky, part of Indiana and part of Illinois.

The Terre Haute trade area, part of Indiana and part of Illinois.

Kankakee is not shown as a trading area here but however Danville is and that is shown as part of Illinois and part Indiana.

This also shows the Chicago area as coming down and taking in part of Indiana. It is very similar to our own setup.

Mr. Lewis:

Q. In your opinion, Mr. McCaffrey, based on your experience in the selling organization of the Harvester Company since 1909, does this map indicate the trade areas in the Indiana district?

Mr. McNamara: To which we object on the ground of immateriality and irrelevancy, and the additional ground that it does not tend to prove or disprove any of the issues in this case.

A. I should say that it does.

Mr. Lewis: We now offer in evidence Plaintiffs' Exhibit 2 for identification, in evidence.

Mr. McNamara: We object to the reception in evidence of Plaintiff Exhibit 2 on the ground it is irrelevant and immaterial, and does not tend to prove or disprove any of the [fol. 113] material issues in this cause, or disprove any of the defenses alleged.

Second, that it is not a public document; third, that it is hearsay evidence of an undisclosed witness not subject to cross examination.

(Whereupon, Plaintiffs' Exhibit 2 for identification was offered in evidence as Plaintiffs' Exhibit 2, and is attached hereto and returned herewith.)

Mr. Lewis:

Q. Mr. McCaffrey, I hand you an atlas of wholesale grocery trading areas, issued by the United States Depart-

ment of Commerce, and will call your attention to a map in the back of that report and will ask you how that is entitled.

A. Wholesale grocery trading areas.

Q. How do the areas in it show up, how are they marked out on this map?

Mr. McNamara: I object to that as incompetent and immaterial.

A. Again, they are very similar to ours. Indianapolis, as you will notice, handles Central Indiana; Fort Wayne, Northwestern Indiana and part of Ohio; Cincinnati, the southwestern part of Ohio, part of Kentucky and part of Indiana; Terre Haute, part of Indiana, extending over into Illinois; Evansville has part of Kentucky, part of Indiana and extends into Illinois; Louisville, part of Kentucky, extending into Indiana.

[fol. 114] Mr. Lewis:

Q. May I ask you if you are quite right about Terre Haute? Doesn't that mean that Indianapolis takes over there?

A. Perhaps so, Indianapolis comes over near Illinois, and also coming out of the Chicago area into Northwestern Indiana.

Q. This is Fort Wayne (indicating), the center of the trading area here, that stops at the Ohio line on the east, I believe?

A. That may be correct.

Q. South Bend has the trading area in between the Chicago and Fort Wayne area?

A. Yes, sir.

Mr. Lewis: I will ask that the map just referred to be marked as Plaintiffs' Exhibit 3, for identification, and I will now offer Plaintiffs' Exhibit 3 for identification in evidence as Plaintiffs' Exhibit 3.

(Marked for identification.)

Mr. McNamara: The defendants object to the introduction in evidence of Plaintiffs' Exhibit 3 on the ground it is irrelevant and immaterial; does not tend to prove or disprove any material issue in the case nor to disprove any defense alleged.

For the further reason, it does not appear that the trading areas with reference to a grocery company would necessarily be the same as those with respect to an agricultural machinery business.

[fol. 115] (Whereupon, Plaintiffs' Exhibit 3, for identification, was so offered in evidence, and is attached hereto and returned herewith.)

Mr. Lewis: You may cross examine.

[fol. 116] Cross-examination.

By Mr. McNamara:

Q. Mr. McCaffrey, these branch-houses located in Indiana, there is some stock of goods kept on hand, isn't there?

A. That is correct.

Q. Can you tell us, just generally, what would be stocked in the general line in the branch house, say, at Fort Wayne?

A. Do you mean the amount of stock, or the kind of goods.

Q. Both.

A. The amount would be very hard for me to tell you, but the kind of goods would not be so hard. For instance, at Fort Wayne is carried, first, tractors; and then all machinery that is applicable to the planting, cultivating and harvesting of corn; for the planting, cultivating and harvesting of wheat; for the planting, cultivating and harvesting of soy beans, and other small grain.

Q. There probably would be enough in quantity to handle all of the business that might be expected in, say, a month's time, is that about it?

A. I should say that would depend upon the demand and the season. I do not know that I could answer that question.

Q. As I get it, the stock would be up at certain seasons of the year, and then go off as the season progresses?

A. That is the way it is.

Q. That would be true generally of all the other branches in Indiana. They carry about the same stock, perhaps with the exception of the Evansville branch, which might have something else?

A. No, it is very similar.

Q. You said that shipments are made usually from transfer houses or from factories, but that under unusual condi-

tions there would be some shipments made from other [fol. 117] branches. That is true, is it?

A. That is true.

Q. That is where one branch has not had as good an experience in getting rid of stock as its neighboring branch?

A. No. That might be the answer but, on the other hand, it might be the availability of the goods or for one reason or another.

Q. Oh, I see. In other words, that means that the dealer who would give this subsequent order might want the goods in a hurry and he could be served quicker from the other branch?

A. Yes, or it might be available from no other place.

Q. On these additional or subsequent orders that you have described, time is very important, is that right?

A. That is usually correct.

Q. Now, just calling your attention to the testimony which you gave with regard to the additional charge which is made at branch houses when they handle trucks. You said there was an additional charge for assembling, handling and servicing?

A. Yes.

Q. What is meant by the servicing?

A. Well, perhaps I had better explain the whole thing, the assembling, handling and servicing.

When a truck is ordered and taken direct from the factory, it is usually ordered with the correct body, with the correct tires and cab for the particular use for which the user has bought it. Our trucks in stock at the branch houses are usually shipped in separately, the chassis, cab and body. Then, when the customer comes in, whatever he might need for his use is assembled for him, and the cost [fol. 118] of doing that at the branch house is an additional charge, as against doing it in the regular assembly at the factory. That is the assembling.

The handling is usually bringing the trucks, for instance, from storage. We may have this truck in storage a mile and a half from the service station, and it is up to the service station to get it ready for this assembly. Then before it gets into the hands of the user, the servicing part is to give it a final tuneup and inspection.

Q. That would probably include grease and oil?

A. Not particularly, because they are usually oiled at the factory, but the tuning up of the carburetor, the checking of the valves and various things, smoothing out the motor and putting the truck in proper running condition, that is the servicing.

Q. Are there any warehouses in Indiana at all? Does each branch have a warehouse in conjunction with it?

A. That is right.

Q. Aside from that, there are no other warehouses in Indiana?

A. There are no other transfer houses, no.

Q. The McCormick-Deering stores are operated independently of the branch house, are they?

A. They are operated under the supervision of the branch house, but on the same basis as a dealer.

Q. And they carry the same stock?

A. The same stock, about the normal dealer's stock.

Mr. McNamara: I guess that is about all.

Mr. Lewis: I should like to ask Mr. McCaffrey a few questions in addition.

[fol. 119] Redirect examination.

By Mr. Lewis:

Q. If a dealer wants a car load lot of goods, where could he normally get them from?

A. From the factory.

Q. Or the transfer house?

A. Or the transfer house.

Q. Not from the branch house?

A. Not ordinarily, no.

Q. Is it true, Mr. McCaffrey, that the branch house's function is to supply the dealers with less-than-carload lots, and those who in the selling season need additional goods and cannot wait to get the goods from the factory or the transfer house?

A. Generally, that is true, for subsequent orders or for fill-ins.

Q. I will put it this way: If a dealer came to the branch at Fort Wayne or Evansville, Indianapolis or Terre Haute, and he wanted a sufficient number of tractors to make a carload lot, that would come from the factory or transfer house?

A. Yes, sir.

Q. But if he wanted one machine, if the branch had it, he would get it from the branch; is that correct?

A. True. That has something to do with the availability of the goods, or rather, the availability of the goods has something to do with that.

Mr. Wallace: I think we had better make it a little more clear as to the stocks that are normally carried at a branch house. In the proposed stipulation of facts the price books [fol. 120] list 2,327 different sizes and kinds of agricultural implements and machines. Now, assuming that that figure is correct, are those different sizes and kinds all carried by a branch house?

A. They are not carried by any branch house, that number.

Q. And of the 8,194 items of agricultural implements and machines in the different sizes and kinds, does the branch house ever purport to carry all of those items?

A. Never.

Mr. McNamara: What does that figure represent?

Mr. Wallace: The total of the different kinds and sizes of attachments for agricultural implements, machines and motor trucks.

Q. So then it is not quite the fact that a branch house carries enough of an inventory to supply a month's business of all kinds and sizes of items, is it?

Mr. McNamara: That is objected to as immaterial and incompetent.

A. On your figures, which I am not repeating because I do not know what the number is, in that number are machines which are used only in certain territories. For instance, machines used in Texas would be absolutely useless [fol. 121] in Indiana and they are included in this total number you talk about. So in this total number are machines used in Texas, Louisiana, California, which are entirely and completely different from the machines used in Indiana, for instance.

So there would be no necessity or demand for carrying them in an Indiana Branch house.

Mr. Wallace:

Q. Would an Indiana branch house carry all the different sizes and kinds of agricultural implements and machines, and their attachments, which are used in Indiana?

Mr. McNamara: Objected to as irrelevant and immaterial, and calling for a conclusion of the witness.

A. It would not carry them all, but the most usable and most salable goods in the sizes and kinds of machines used in that territory.

Mr. Lewis:

Q. And those it would carry, Mr. McCaffrey, it would carry those most in demand in that territory?

A. That is correct.

Mr. Wallace:

Q. Would that be a small or large proportion of this total number of items?

A. By branches, that would be a small proportion of the total at any one branch house.

Q. Would it be a small or large proportion of the total number of items usable and salable in that particular territory? [fol. 122]

A. It would be a large proportion of the different items used in the territory but a small proportion of the total sales of that territory of those items.

Mr. Lewis:

Q. In other words, if you had, just for illustration, there was 100 kinds of machines that were used in that territory, you might have a sample of each of the machines?

A. Yes, sir.

Q. But not nearly enough to supply the total demand of that territory?

A. That is it, exactly.

Mr. Lewis: I think that is all.

Mr. McNamara: Just a question or two further.

[fol. 123] Recross-examination.

By Mr. McNamara:

Q. But you probably would have some stock of each of the 100 items, wouldn't you?

A. That is correct.

Q. When a dealer gives a subsequent shipping order and asks for delivery in the quickest manner, who determines the point from which the goods are to be shipped?

Q. Well, the dealer would ordinarily say, but that would depend on the size of the order, to start with, whether a car load or less than car load; the dealer would say in the case of a car load, "Ship from factory, or the quickest possible way." That is probably the way the order would read. I have seen many that did read that way.

For less than car load lots, it would be a question of expense of delivery, probably, and would not make much difference whether shipped from the factory or branch, if it was less than car load lot, and the decision would be made at the branch as to which way was the most economical or the quickest way to get it to the dealer.

Mr. McNamara: That is all.

[fol. 124] Redirect examination.

By Mr. Lewis:

Mr. Lewis: Just to make sure we understand each other, on a car load lot or more than a car lot shipment, the dealer would specify he wanted it from the transfer house or factory in a large proportion of the cases?

A. That would be usual.

Q. Because of the saving of freight?

A. Yes.

Mr. McNamara: To which we object that last question, on the ground that it is immaterial and calls for a conclusion as to why the dealer wanted it done that way.

Mr. Lewis:

Q. The dealers do, to a large degree, specify on car lot shipments or more than car lot shipments that they want shipment from the factory or transfer house, and on such shipments there is a material saving in freight?

A. That is correct.

Mr. McNamara: And that is the same instance you have been saying, that the shipping order usually read from the factory, or the quickest way,—I believe is, the language [fol. 125] used, the quickest possible way?

A. The quickest possible way. The dealer then has in mind where the supply of goods may be.

Mr. McNamara: That is right. I believe that is all.

Mr. Lewis: That is all.

(Signed) John L. McCaffrey.

Subscribed and sworn to before me, this 24th day of June, A. D. 1940. (Signed) Roy de Vincent Cox, Notary Public. (Seal Notary Public, Roy de Vincent Cox, Dupage County.)

[fol. 126] Mr. Lewis: Mr. McNamara, I have here a county outline map of Indiana, published by Rand-McNally Company, which I am asking the reporter to mark as Plaintiffs' Exhibit 4, for identification, and ask that it be received as Exhibit 4.

(Marked for identification, as requested.)

Mr. McNamara: I have no objection to the introduction of the exhibit.

(Whereupon, the document marked as Plaintiffs' Exhibit 4, for identification; was offered in evidence as Plaintiffs' Exhibit 4; said document is attached hereto and returned herewith.)

Mr. Lewis: Will the notary please swear Mr. Woller?

A. T. WOLLER, a witness, called on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Lewis:

Q. Will you give us your name, residence and occupation, please?

A. A. T. Woller; residence, Chicago, Illinois; occupation, with the accounting department of the International Harvester Company.

Q. How long have you been employed by the International Harvester Company, or the International Harvester Company of America?

A. Since April of 1913, a period of over 27 years.

Q. And that experience has been in the accounting department?

A. All the service in the accounting department with the International Harvester Company of America and the International Harvester.

[fol. 127] Q. Where did you begin your employment?

A. At the Dubuque, Iowa branch house of the company.

Q. What year was that?

A. 1913.

Q. How long did you stay there?

A. I was at the Dubuque, Iowa branch house from 1913 to 1919, or six years.

The next seven years, with the Nashville, Tennessee house, where I held the position of office manager, and after the service at the Nashville branch I was traveling auditor for one year.

From 1927, up to the present time, I have been in the accounting department, general office of the International Harvest- Company.

Q. In Chicago?

A. At Chicago.

Q. Just explain what are the duties of an office manager, briefly.

A. An office manager is responsible for the accounting procedure at the branch house, and to see that all the transactions are recorded and report made of the business in accordance with the company's policy.

Q. Briefly, what are your duties at present in the accounting department of the International Harvester Company in Chicago?

A. To assist in the supervision of the accounting procedure at branch houses, and particularly to keep the branches informed and issue instructions to branches regarding requirements on the various tax sales laws.

Q. Do your duties include any responsibility for the Indiana gross income tax?

A. It does.

[fol. 128] Q. What do you do in that regard?

A. It is to issue instructions to branch houses as to information required under that law.

Q. Information for what?

A. For tax returns.

Q. Have you been doing that since the enactment of this law?

A. Yes, since 1933.

Q. From 1933 to date?

A. Yes, sir.

Mr. Lewis: Mr. Reporter, will you please mark this document as Plaintiffs' exhibit 5, for identification.

(Document marked as requested, Plaintiffs' Exhibit 5, for identification.)

Mr. Lewis:

Q. Mr. Woller, I hand you herewith Plaintiffs' Exhibit 5, for identification, and ask you to state what that exhibit is.

A. It is a comparison of freight charges to Indiana dealers, showing the freight from factory to dealer's town, freight from Chicago transfer to dealer's town, and freight charges for shipment from branch.

Q. In what?

A. In the year 1936.

Q. Was this exhibit prepared under your supervision?

A. It was.

Q. How did you get the figures? Take on this exhibit, the first item you have, the branch at Fort Wayne, Indiana, dealer's town at Marion, Indiana. "10-foot tractor grain binder." That was made at the factory in Chicago. Where did you get the weight?

A. From the company's price schedule and contract.

Q. And the amount of freight from factory to the dealer's [fol. 129] town, \$4.91. Where did you get that?

A. That is computed on the base of freight rate furnished by the traffic department.

Q. Of the International Harvester Company?

A. Of the company, yes.

Q. And the freight from Chicago to dealer's town, where did you get that figure?

A. All the amounts on this statement were based on the freight rate furnished by the traffic department of the Harvester Company.

Q. And the same for shipment from the branch, \$9.61, in that case?

A. Yes, sir.

Q. And that applies to all the other items on the exhibit, on all the various machines listed there?

A. Yes, on the basis of those freight rates.

Q. And these are the freight rates that were in effect in 1936?

A. Yes, sir.

Q. Will you explain that note "A" at the bottom?

A. In 1935 and 1936 company absorbed the freight on car lot shipments of tillage implements from factory to dealer's town.

Q. What is meant by "tillage implements"?

A. That would be ploughs, disc harrows, cultivators, corn planters, etc.

Q. The note is that the company absorbed the freight from factory to dealer's town on car lot shipments?

A. Yes, sir.

Q. Explain note B, "Includes freight from factory, (or Chicago, whichever is less) to branch plus handling charge at branch and freight from branch to dealer's town."

[fol. 130] A. Well, in 1936 if a dealer took delivery from a branch house, he paid the freight from branch house to destination, and in addition was charged with the car lot rate of freight from factory, or Chicago, whichever was less, to branch house, plus handling charge at the branch.

Q. Anything else?

A. No, that is all.

Q. Now, what does that handling charge at the branch mean?

A. That means partially reimbursing the company for the cost of receiving or unloading the goods, storing and reshipping.

Q. Does it include any service or greasing or lubrication?

A. No, it does not.

Q. It is unloading from the car when it came from the factory, and loading it again on the car when it goes to the dealer's town, is that correct?

A. And also partially covers the expense of storage.

Q. Are the goods contained in wood cases?

A. They are in shipping packages. In other words, they are not assembled; if shipped in car lot, they are shipped to the dealer in the original shipping packages as received from the factory.

Q. In the case of these articles mentioned and shown in the exhibit, to the extent that applies to all agricultural implements, the handling charges does not include any assembly or disassembly, or greasing, lubrication, no loading charge, loading from the branch house to the dealer's town, but a small storage charge?

A. It covers the unloading, storage and reshipping.

Q. Will you explain note C, Mr. Woller?

[fol. 131] A. Note C reads, "Freight from branch to dealer's town. Branch absorbed handling charge and freight from factory to branch on tillage implements in 1935 and 1936."

In 1936, if a tillage implement was shipped from a branch house to the dealer, the only freight the dealer paid was from the branch to the dealer's town.

Q. In other words, take a sample from the exhibit, in the case of F-20 Farmall tractor, which is made at Rock Island, Illinois, the freight on that from the factory at Rock Island, Illinois to the dealer's town—in this case, Marion, Indiana—would be \$9.17; and the freight also from the Chicago transfer warehouse to Marion, Indiana, would be \$9.17; but the freight charges to the dealer if that was shipped to him from the branch, would be \$17.93, which would include the freight from the factory to the branch, from the branch to the dealer's town, plus handling charges at the branch?

Mr. McNamara: We object to that for the reason it is immaterial and irrelevant; does not tend to prove or disprove any material issue in the cause, or disprove any defense; and for the further reason it appears on its face to be a purely hypothetical question, not shown that any such transaction has ever taken place in the years in question.

A. In the case shown on the exhibit here, F-20 Farmall tractor, shipped from branch house, dealer would pay the freight on the basis of freight from factory, or Chicago, whichever was less, to the branch, plus a handling charge, [fol. 132] plus freight from the branch house to the dealer's town.

Mr. Lewis: We offer in evidence Plaintiffs' Exhibit 5, for identification, being a comparison of freight charges to Indiana dealers for the year 1936 of the International Harvester Company.

Mr. McNamara: The defendants object to the introduction in evidence of Plaintiffs' Exhibit 5 and state as its reason the following grounds:

First, it is a self serving document; second, it is not a public document entitled to inspection as such, but a purely private paper; does not purport to exhibit all possible combinations that might exist; fourth, it is immaterial and irrelevant and does not prove or disprove any of the issues in this case.

(Whereupon, Plaintiffs' Exhibit 5, for identification, was offered in evidence as Plaintiffs' Exhibit 5, and is attached hereto and returned herewith.)

Mr. Lewis: I will ask the reporter to mark this document I hand him as Plaintiffs' Exhibit 6, for identification.

(Document marked as requested, Plaintiffs' Exhibit 6, for identification.)

Mr. Lewis:

[fol. 133] **Q.** Mr. Woller, I hand you Plaintiffs' Exhibit 6, for identification, being a document entitled, "Delivery charges for International motor trucks, effective in 1936," and ask you what that exhibit is.

A. It is a comparison of cost of delivery of a motor truck direct from factory to dealer, or customer, compared with cost of delivery from branch house.

Q. Was this exhibit prepared under your supervision?

A. It was.

Q. You obtained the drive-away company's charges in each case, from factory to the dealer's town, and from the branch house to the dealer?

A. Yes, sir, I obtained those rates from the traffic department of the International Harvester Company.

Q. I notice that the exhibit shows, it is taken as an illustration of Fort Wayne deliveries for the C-40 chassis and cab, and Springfield deliveries covering the C-1 chassis and cab. I understand that means C-40 chassis and cab was manufactured at Fort Wayne, Indiana, and the C-1 chassis and cab was manufactured at Springfield, Ohio?

A. That is correct.

Q. If you will refer to that exhibit, to the first illustration, sale by branch at Cincinnati, to dealer in Hamilton,

Ohio, the drive-away company's charge for the drive-away from Fort Wayne works to Hamilton would be \$10.50?

A. That is correct.

Q. And the drive-away company's charge for drive-away from the Fort Wayne works to Cincinnati, where the branch is, would be \$11.50?

A. Yes, sir.

Q. Then you have a handling charge at Cincinnati of \$25?
[fol. 134] A. Yes.

Q. What is the total charge to the dealer in Hamilton, Ohio, if he takes that truck by delivery from Cincinnati?

A. That would be \$36.50.

Q. How does he get the truck from Cincinnati to Hamilton?

A. He drives it away, himself.

Q. Then, in other words, if a dealer got that truck by drive-away from Fort Wayne to his town at Hamilton, the cost would be \$10.50?

A. Yes, sir.

Q. And if from the branch house, it would be \$36.50 and in addition the dealer would have to get that truck driven or drive it himself from Cincinnati to Hamilton?

A. Yes.

Q. What do you mean by the handling charge at Cincinnati?

A. The handling charge represents tuning the motor, cleaning and polishing the truck, changing the equipment and all services necessary to prepare the truck for delivery.

Q. It does not include the cost of different tubes or tires or rims, or anything like that? If the dealer wants a type of tire or rim or tube, or any other appliance that is different from what is on the truck as it comes from Cincinnati, you do not include that?

A. No, it covers servicing only.

Q. It would cover the cost of changing from one tire to another, but not the cost of the tire? That would be an extra charge?

A. Yes, sir.

Q. Is the handling charge on the sale to user or consumer the same as the handling charge on the sale to dealer?

A. It was in 1936.

Q. And in 1935?

[fol. 135] A. Yes, 1935, also.

Q. Now, the same explanation applies to each of the other cases illustrated in Sections A, B, C, D, all the way down to J?

A. It does.

Mr. Lewis: We offer in evidence at this time Plaintiffs' Exhibit 6, for identification, in evidence as Plaintiffs' Exhibit 6.

Mr. McNamara: And the defendants object to the introduction in evidence of Plaintiffs' Exhibit 6 on the grounds that such exhibit is incompetent, immaterial and irrelevant; it is self serving; it is not a public document entitled to introduction as such, but merely a private paper, and does not purport to exhibit all the possible combinations that might exist; and in addition, it calls for a conclusion of the person who prepared it.

(Whereupon, Plaintiffs' Exhibit 6, for identification, was offered in evidence as Plaintiffs' Exhibit 6, and is attached hereto and returned herewith.)

Mr. Lewis: Mr. Reporter, will you please mark this document as Plaintiffs' Exhibit 7, for identification.

(Document marked as requested, Plaintiffs' Exhibit 7, for identification.)

Mr. Lewis:

Q. Mr. Woller, I show you Plaintiffs' Exhibit No. 7, for [fol. 136] identification, which is a table showing the amount of Indiana manufacture and outside manufacture of all goods, except repairs, sold by Indiana branches, and outside branches selling to Indiana customers in 1935 and 1936. Was that exhibit prepared under your supervision?

A. It was.

Q. Did you make inquiry of the Indiana branches and the branches that make sales to Indiana customers of the goods they sold in 1935 and 1936?

A. The information was compiled at the general offices of the International Harvester Company and from reports received from its branch houses.

Mr. McNamara: I am objecting to this line of questioning on the ground it is immaterial and irrelevant, and I

should like to have that objection as to each one of the questions pertaining to this exhibit.

Mr. Lewis: Yes.

Q. Do I understand you, Mr. Woller, to say you asked the Indiana branches and also the branches outside of Indiana which sold to Indiana customers to make report to you of all goods of Indiana manufacture that they sold in 1935 and 1936 to Indiana customers, or to all customers?

A. Sold to all customers of Indiana manufacture.

Q. You asked the Evansville branch, for example, to report all sales they made of Indiana manufacture, out of all their sales, that were of Indiana manufacture, is that correct?

A. Yes, sir.

Q. And the same way with Fort Wayne, Indiana, Indianapolis, Terre Haute, you asked them to check their total sales and report how much of their total sales were of Indiana manufacture?

A. Yes, sir.

Q. How about Cincinnati, Kankakee and Louisville, did they report their total sales, or just sales of Indiana manufacture?

A. Their sales, the same as the branches in Indiana.

Q. Their total sales, how much of their total sales were of Indiana manufacture?

A. Yes, sir.

Q. And the same way with the Chicago Motor Truck?

A. Yes, sir.

Mr. McNamara: I am objecting to all this, it is understood that my objection goes to all these questions on the ground that they are immaterial and irrelevant.

Mr. Lewis: Yes.

Q. Evansville, for example, reported that in 1935 it made \$1,551,148.63 in sales?

A. Yes, sir.

Q. Evansville also reported to you that of those sales, \$207,541.60 were sales of goods of Indiana manufacture, is that what it means?

A. Yes, sir.

Mr. McNamara: To which questions I am objecting as being immaterial and irrelevant.

Mr. Lewis:

Q. And the same way with each one of the items on the exhibit?

[fol.138] A. Yes.

Mr. McNamara: I object to it as incompetent and immaterial.

Mr. Lewis:

Q. You believe that this exhibit correctly shows the amount of Indiana manufacture and sales by the branches concerned?

A. I do.

Mr. Lewis: We offer in evidence Plaintiffs' Exhibit 7, for identification, in evidence as Exhibit 7.

Mr. McNamara: The defendants object to the reception in evidence of Plaintiffs' Exhibit 7, for identification; on the ground that such evidence is immaterial and irrelevant; does not tend to prove or disprove any issue in this case, nor tend to disprove any of the defenses alleged.

That it is a self serving document that it eliminates without reason or explanation repair and replacement of parts.

That it is a conclusion of the person compiling said exhibit, based upon conclusions made by persons at the branches; there is no availability for examination of the persons making the original conclusions as to what was or what was not of Indiana manufacture, such persons [fol. 139] being located in the divers branches represented by said exhibit.

(Whereupon, the document marked as Plaintiffs' Exhibit 7, for identification, was offered in evidence as Plaintiffs' Exhibit 7; said document is attached hereto and returned herewith.)

Mr. Lewis:

Q. Mr. Weller, will you kindly explain why repairs were not included in your computation on this exhibit?

A. Because of the tremendous amount of clerical work involved. The average branch has around 30,000 repair invoices, and it would have been necessary for each of the

branches to analyze each of the invoices to obtain the information pertaining to the repairs or parts.

Mr. Lewis: Please mark this document as Plaintiffs' Exhibit 8 for identification.

(Document marked as requested, Plaintiffs' Exhibit 8, for identification.)

Mr. Lewis:

Q. I hand you, Mr. Wøller, Plaintiffs' Exhibit 8, for identification, and ask you to state what that is?

A. It is a table of sales of all goods, except repairs, in 1935 and 1936 by Indiana branches of International Harvester Company, showing how goods were shipped or delivered..

Q. Was this exhibit prepared under your supervision?

A. It was.

Q. Will you explain the exhibit? Start off there with Evansville and show the amount of sales of goods shipped from the branch house at Evansville or delivery taken by [fol 140] buyer at the branch house in 1935 as \$751,066.17, is that correct?

A. That is correct.

Q. And you have the amount of sales of goods shipped or delivered by common carrier from factories and transfer houses direct to dealers and users, and you show that amount as \$676,145.69?

A. Yes.

Q. And the sales in which the dealers and users took delivery themselves at factories and transfer houses, and you show that as \$123,936.77, or making in all a total sales for Evansville in 1935 of \$1,551,148.63?

A. Yes.

Q. Now, what was the percentage of sales filled by shipment or delivery from the various transfer houses to total sales?

Mr. McNamara: I object to that on the ground it is irrelevant and immaterial.

A. 51.58 per cent.

Mr. Lewis:

Q. And you have carried the same methods out in your figures shown for Terre Haute and Fort Wayne?

A. Yes, sir.

Q. Why have you no figures for Indianapolis branch?

A. Because the records were destroyed at Indianapolis through oversight.

Mr. Lewis: We offer Plaintiffs' Exhibit 8, for identification, in evidence.

Mr. McNamara: The defendants object to the reception [fol. 141] in evidence of Plaintiffs' Exhibit 8, on the ground it is immaterial and irrelevant; that it does not tend to prove or disprove any of the material issues in the case, or disprove any of the defenses alleged; and for the further reason it eliminates repair and replacement parts.

(Whereupon, the document previously marked for identification was offered in evidence as Plaintiffs' Exhibit 8, and is attached hereto and returned herewith.)

Mr. Lewis:

Q. I should like to revert to Exhibit 7, with the permission of Mr. McNamara.

Mr. McNamara: Go ahead.

Mr. Lewis:

Q. Explain Exhibit 7, Mr. Woller, as to the amount of Indiana manufacture and outside manufacture; Do I understand you to say that these figures, total sales of all goods, except repairs, were taken from the regular annual report made by the company?

A. Not of the company but from the branch house.

Q. In other words, it was not a special report prepared at your request?

A. That is correct, prepared from the annual reports furnished by the branch houses.

Q. And you have supervision over those reports?

A. Yes, sir.

Q. And the same way with the sales of Indiana manufacture taken from 1936 annual reports made?

A. Yes, sir.

Q. And not specially prepared for this case?

A. No, from the annual report from each of the branches.

Mr. Lewis: That is all. Any cross examination?

Cross-examination.

By Mr. McNamara:

Q. Mr. Woller, directing your attention to Plaintiffs' Exhibit 5, and specifically directing your attention to Column 8, I will ask you whether or not it is not true that the words, "Freight charges" actually include certain charges which are not precisely for freight?

A. In addition to freight, it only includes a charge for handling of six cents per hundredweight.

Q. And that charge described in Column 8 on Plaintiffs' Exhibit 5 is paid by the dealer to the International Harvester Company?

A. It is.

Q. Plaintiffs' Exhibit 5 deals with what is known as general line goods, that is agricultural implements, is that true?

A. Yes, sir.

Q. And does not include motor trucks or motor vehicles?

A. No.

Q. The motor vehicles and trucks are covered by plaintiffs' Exhibit 6, is that true?

A. Yes.

Q. And there the handling charge includes washing, polishing the truck, changing oil and lubricating the chassis, making necessary checks and adjustments, changing tires, tubes and rims, if required, and installing standard equipment; if required, and all other services necessary to prepare the trucks for delivery from the drive-away to the dealer?

A. That is correct.

Q. And that handling charge referred to on Page 3 of Plaintiffs' Exhibit 6 covers the cost of the oil or lubricating material used in that service?

A. No, it would not.

Q. Just the servicing, itself?

A. Just the servicing, itself.

Mr. McNamara: That is all.

Mr. Lewis: I guess that is all.

(Signed) A. T. Woller.

Subscribed and sworn to before me, this 24th day of June, A. D. 1940. (Signed) Roy deVincent Cox, Notary Public. (Seal.)

[fol. 144]

CERTIFICATE OF REPORTER

I, Roy de Vincent Cox, a notary public authorized by the laws of the State of Illinois to administer oaths, do hereby certify and return that the foregoing are the depositions of John L. McCaffrey and A. T. Woller, of Chicago, Illinois, taken on behalf of the plaintiffs, before me, in the general offices of the International Harvester Company, Suite 1800, 180 North Michigan Avenue, Chicago, Illinois, on Tuesday, June 18th, A. D. 1940, beginning at 1:30 o'clock p. m., and finished the same day.

That said witnesses were first duly sworn by me to tell the truth, the whole truth and nothing but the truth concerning the matters at issue in said cause, and were then examined by counsel and testified as appears in the foregoing questions and answers; that the testimony of said witnesses was by me taken stenographically and transcribed under my direction; that the foregoing is the correct testimony of the said witnesses as given before me at the time and place aforesaid.

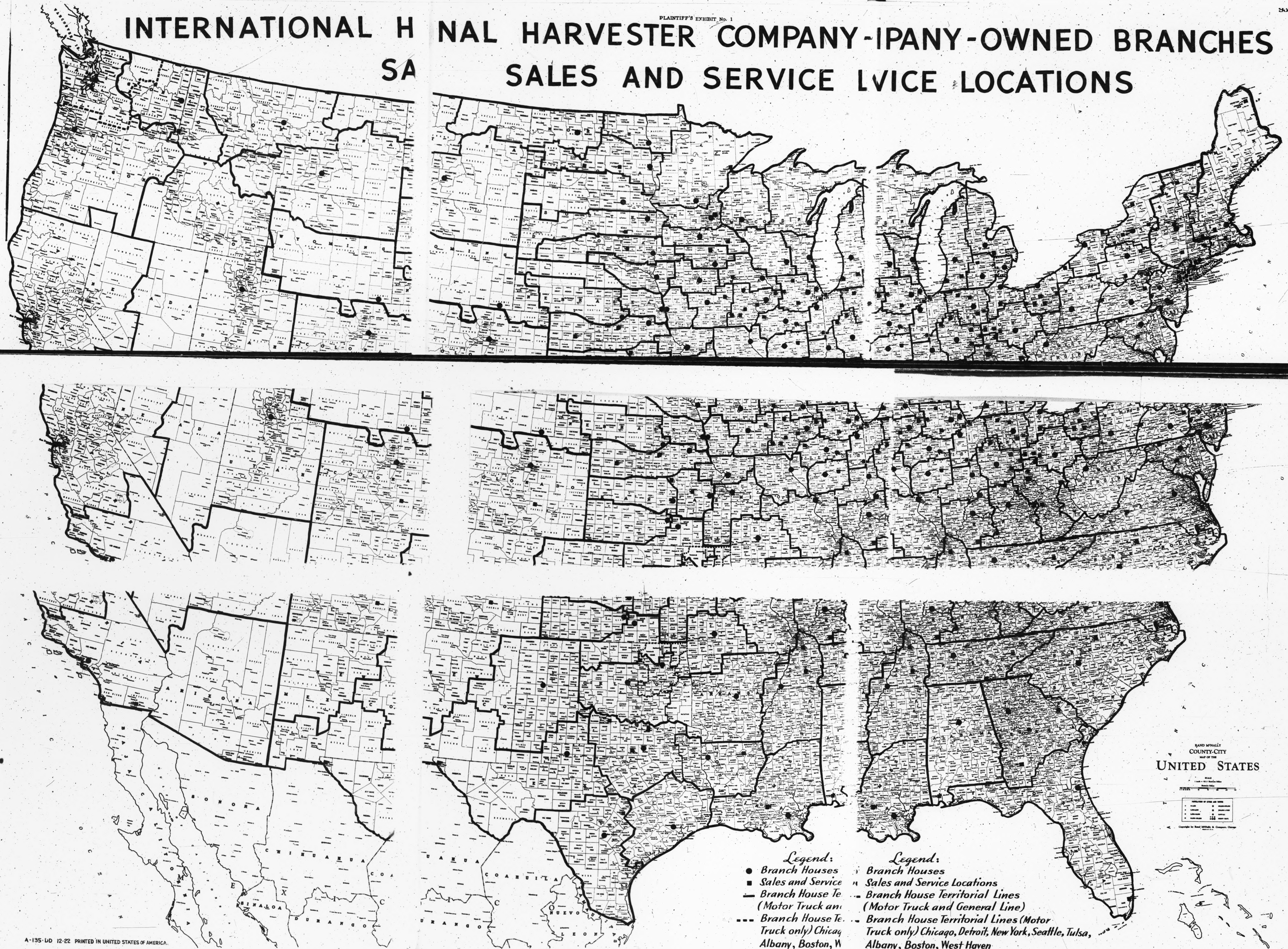
That there were present at the taking of the said depositions, Mr. Edward R. Lewis and Mr. Warrack Wallace, appearing for the plaintiffs, and Mr. Joseph P. McNamara, appearing for the defendants.

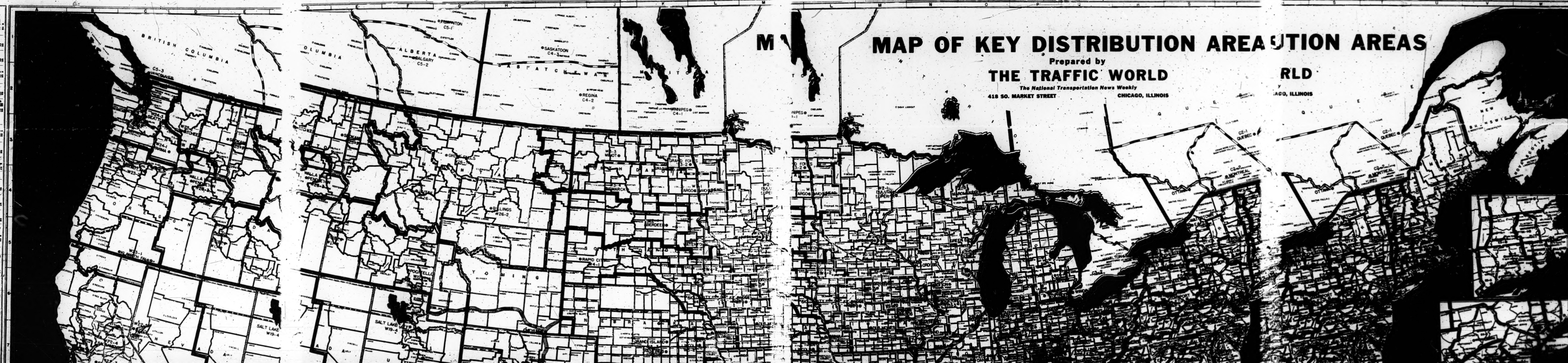
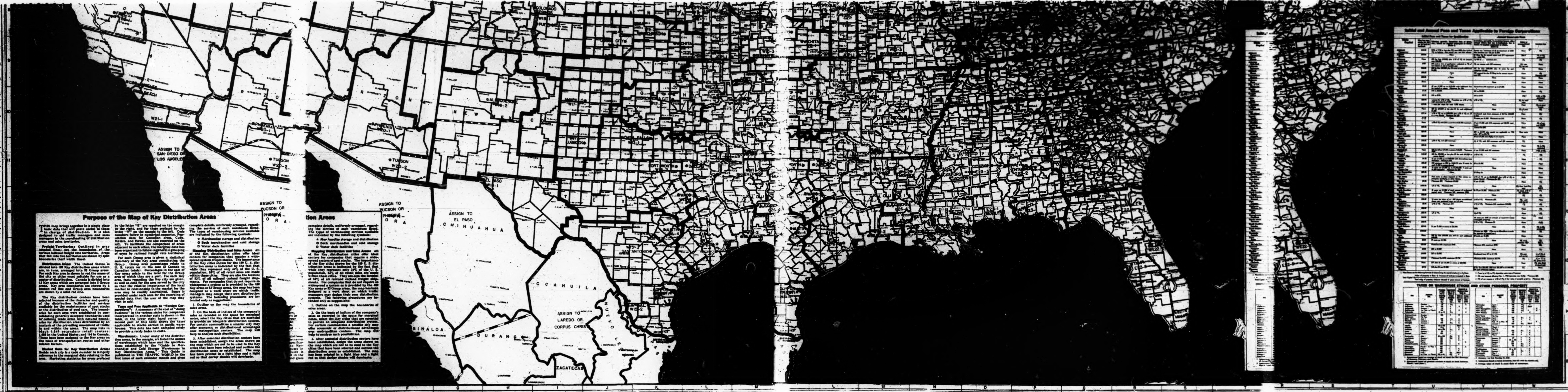
I further certify that I am not of counsel or attorney for either of the parties to the above cause, nor interested in the event of said cause.

Witness my hand and official seal, this 20th day of June, A. D. 1940.

(Signed) Roy de Vincent Cox, Notary Public, Du-
[fol. 145] Page County, Illinois. (Seal.)

INTERNATIONAL HARVESTER COMPANY-OWNED BRANCHES SALES AND SERVICE LOCATIONS



[illegible][illegible][illegible][illegible][illegible][illegible]

PLAINTIFFS EXHIBIT No. 5

International Harvester Company

Comparison of Freight Charges to Indiana Dealers

Year 1936

Branch	Dealers Town	Type of Machine	Location of Factory	Weight of Machine	Freight from Factory to Dealers Town	Freight from Chicago Transfer to Dealers Town	Freight Charges for Shipment from Branch
Fort Wayne, Ind.	Marion, Ind.	10 ft. Tractor Grain Binder	Chicago, Ill.	2,135 lbs.	\$4.91	\$4.91	\$9.61 (B)
		1½ H.P. LA Engine	Milwaukee, Wis.	175 lbs.	.40	.40	.79 (B)
		F-20 Farmall Tractor	Rock Island, Ill.	3,985 lbs.	9.17	9.17	17.93 (B)
		5 ft. 16 in. Disk Harrow	Rock Falls, Ill.	400 lbs.	None (A)	None (A)	.64 (C)
		No. 8 2-Fur. 14 in. Little Genius Plow	Canton, Ill.	854 lbs.	None (A)	None (A)	1.37 (C)
Indianapolis, Ind.	Kokomo, Ind.	10 ft. Tractor Grain Binder	Chicago, Ill.	2,135 lbs.	4.70	4.70	10.03 (B)
		1½ H.P. LA Engine	Milwaukee, Wis.	175 lbs.	.39	.39	.82 (B)
		F-20 Farmall Tractor	Rock Island, Ill.	3,985 lbs.	8.77	8.77	18.73 (B)
		5 ft. 16 in. Disk Harrow	Rock Falls, Ill.	400 lbs.	None (A)	None (A)	.64 (C)
		No. 8 2-Fur. 14 in. Little Genius Plow	Canton, Ill.	854 lbs.	None (A)	None (A)	1.37 (C)
Indianapolis, Ind.	Columbus, Ind.	10 ft. Tractor Grain Binder	Chicago, Ill.	2,135 lbs.	5.76	5.76	9.82 (B)
		1½ H.P. LA Engine	Milwaukee, Wis.	175 lbs.	.47	.47	.81 (B)
		F-20 Farmall Tractor	Rock Island, Ill.	3,985 lbs.	10.76	10.76	18.33 (B)
		5 ft. 16 in. Disk Harrow	Rock Falls, Ill.	400 lbs.	None (A)	None (A)	.60 (C)
		No. 8 2-Fur. 14 in. Little Genius Plow	Canton, Ill.	854 lbs.	None (A)	None (A)	1.28 (C)

NOTE: (A) In 1935 and 1936 Company absorbed freight on car lot shipments of tillage implements from factory to dealers town.

(B) Includes freight from factory (or Chicago, whichever is less) to Branch plus handling charge at Branch and freight from Branch to dealers town.

(C) Freight from Branch to dealers town. Branch absorbed handling charge and freight from factory to Branch on tillage implements in 1935 and 1936.

All freight charges are computed at car lot rail rate.

(fol. 148]

PLAINTIFFS' EXHIBIT No. 6

Delivery Charges for International Motor Trucks

Effective in 1936

Fort Wayne deliveries cover the C-40 Chassis and Cab.
 Springfield deliveries cover the C-1 Chassis and Cab.

A. Sale by Branch at Cincinnati to Dealer in Hamilton, Ohio.

(a) Driveaway company's charge for driveaway from Fort Wayne Works to Hamilton, Ohio.....	10.50
(b) Driveaway company's charge for driveaway from Fort Wayne Works to Cincinnati.....	\$11.50
Handling charge at Cincinnati.....	25.00

Cost if delivery is made from Branch..... 36.50
 In addition, dealer has cost of driveaway from Cincinnati to Hamilton.

B. Sale by Louisville Branch to Dealer in Elizabethtown, Ky.

(a) Driveaway company's charge for driveaway from Fort Wayne Works to Elizabethtown.....	25.00
(b) Driveaway company's charge for driveaway from Fort Wayne Works to Louisville.....	20.50
Handling charge at Louisville.....	25.00

Cost if delivery is made from Branch..... 45.50
 In addition, dealer has cost of driveaway from Louisville to Elizabethtown.

C. Sale by Kankakee Branch to Dealer in Watseka, Illinois.

(a) Driveaway company's charge for driveaway from Fort Wayne Works to Watseka.....	\$11.00
(b) Driveaway company's charge for driveaway from Fort Wayne Works to Kankakee.....	\$11.00
Handling charge at Kankakee.....	25.00

Cost if delivery is made from Branch..... 36.00

(fol. 149]

In addition, dealer has cost of driveaway from Kankakee to Watseka.

D. Sale by Cincinnati Branch to Dealer in Brookville, Indiana.

(a) Driveaway company's charge for driveaway from Fort Wayne Works to Brookville.....	10.81
(b) Driveaway company's charge for driveaway from Fort Wayne Works to Cincinnati.....	11.50
Handling charge at Cincinnati.....	25.00

Cost if delivery is made from branch..... 36.50
 In addition, dealer has cost of driveaway from Cincinnati to Brookville.

E. Sale by Louisville Branch to Dealer in Salem, Indiana.

(a) Driveaway company's charge for driveaway from Fort Wayne Works to Salem.....	20.50
(b) Driveaway company's charge for driveaway from Fort Wayne Works to Louisville.....	20.50
Handling charge at Louisville.....	25.00

Cost if delivery is made from Branch..... 45.50
 In addition, dealer has cost of driveaway from Louisville to Salem.

F. Sale by Kankakee, Illinois, Branch to Dealer in Fowler, Ind.

(a) Driveaway company's charge for driveaway from Fort Wayne Works to Fowler	11.00
(b) Driveaway company's charge for driveaway from Fort Wayne Works to Kankakee	11.00
Handling charge at Kankakee	25.00

Cost if delivery is made from Branch

In addition, dealer has cost of driveaway from Kankakee to Fowler. 36.00

G. Sale by Evansville Branch to Dealer in Madisonville, Ky.

(a) Driveaway company's charge for driveaway from Fort Wayne Works to Madisonville	21.50
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[fol. 150]

(b) Driveaway company's charge for driveaway from Fort Wayne Works to Evansville	21.50
Handling charge at Evansville	25.00

Cost if delivery is made from Branch

In addition, dealer has cost of drive away from Evansville to Madisonville. 46.50

H. Sale by Terre Haute Branch to Dealer in Paris, Illinois.

(a) Driveaway company's charge for driveaway from Fort Wayne Works to Paris	13.00
(b) Driveaway company's charge for driveaway from Fort Wayne Works to Terre Haute	13.00
Handling charge at Terre Haute	25.00

Cost if delivery is made from Branch

In addition, dealer has cost of driveaway from Terre Haute to Paris. 38.00

I. Sale by Evansville Branch to Dealer in Jasper, Indiana.

(a) Driveaway company's charge for driveaway from Springfield Works to Jasper	17.00
(b) Driveaway company's charge for driveaway from Springfield Works to Evansville	17.00
Handling charge at Evansville	10.00

Cost if delivery is made from Branch

In addition, dealer has cost of driveaway from Evansville to Jasper. 27.00

J. Sale by Indianapolis Branch to Dealer in Columbus, Indiana.

(a) Driveaway company's charge for driveaway from Springfield Works to Columbus	12.00
(b) Driveaway company's charge for driveaway from Springfield Works to Indianapolis	10.00
Handling charge at Indianapolis	10.00

Cost if delivery is made from Branch

In addition, dealer has cost of driveaway from Indianapolis to Columbus. 20.00

[fol. 151]

NOTE:

Driveaway rates are ordinarily based on a combination two truck delivery. The driveaway rates given above are one-half the pair rates.

The charge for handling at the Branch is made for washing and polishing the truck, changing oil and lubrication of chassis, making all necessary checks and adjustments, changing tires, tubes and rims if required, installing standard equipment, and all other services necessary to prepare the truck for driveaway from the branch to the dealer. The handling charge for delivery to a user, namely the consumer, was the same in 1935 and 1936 as the handling charge on a sale to a dealer.

PLAINTIFFS' EXHIBIT No. 7

Amount of Indiana Manufacture and Outside Manufacture of All Goods, Except Repairs, Sold by Indiana Branches, and Outside Branches, Selling to Indiana Customers in 1935 and 1936.

Branch	1935		Percentage
	Total Sales of All Goods except Repairs	Sales of Indiana Manufacture	
Evansville	\$1,551,148.63	\$207,541.60	13.38%
Fort Wayne	1,984,912.65	294,958.92	14.86
Indianapolis	2,825,247.63	321,310.05	11.37
Terre Haute	1,628,112.11	130,612.91	8.02
Chicago Motor Tr.	1,053,078.04	525,035.58	49.86
Cincinnati	1,567,361.23	330,642.05	21.10
Kankakee	1,846,723.56	152,880.29	8.28
Louisville	1,344,867.82	272,119.48	20.23

[fol. 152]

Branch	1936		Percentage
	Total Sales of All Goods Except Repairs	Sales of Indiana Manufacture	
Evansville	1,839,875.23	264,112.59	14.35
Fort Wayne	2,710,463.51	352,057.25	12.99
Indianapolis	3,735,859.04	462,260.11	12.37
Terre Haute	1,808,904.49	155,190.71	8.58
Chicago Motor Tr.	1,532,845.19	766,501.14	50.01
Cincinnati	2,278,686.11	446,432.90	19.59
Kankakee	2,495,305.52	188,018.98	7.53
Louisville	1,662,504.80	344,258.71	20.71

Branch	1935 and 1936 Combined		Percentage
	Total Sales of All Goods Except Repairs	Sales of Indiana Manufacture	
Evansville	3,391,023.86	471,654.19	13.91
Fort Wayne	4,695,376.16	647,016.17	13.78
Indianapolis	6,561,106.67	783,570.16	11.94
Terre Haute	3,437,016.60	258,803.62	8.32
Chicago Motor Tr.	2,585,923.23	1,291,536.72	49.94
Cincinnati	3,846,047.34	777,074.95	20.20
Kankakee	4,342,029.08	340,899.27	7.85
Louisville	3,007,372.62	616,378.19	20.50

PLAINTIFFS' EXHIBIT No. 8

Table of Sales of All Goods, Except Repairs, in 1935 and 1936 by Indiana Branches of International Harvester Company, Showing How Goods Were Shipped or Delivered.

	Evansville	
	1935	1936
(a) Sales of goods shipped from the branch house or delivery taken by buyer at branch house	\$751,066.17	\$794,642.12
(b) Sales of goods shipped or delivered by common carrier from factories and transfer houses direct to dealers and users	676,145.69	974,397.92
[fol. 153]		
(c) Sales in which dealers and users took delivery themselves at factories and transfer houses	123,936.77	70,835.19
Total sales	\$1,551,148.63	1,839,875.23
Percentage of sales filled by shipment or delivery from factories and transfer houses	51.58%	56.81%

Terre Haute		1935	1936
(a)	Sales of goods shipped from the branch house, or delivery taken by buyer at branch house.....	\$818,940.39	858,325.19
(b)	Sales of goods shipped or delivered by common carrier from factories and transfer houses direct to dealers and users.....	735,906.68	883,649.84
(c)	Sales in which dealers and users took delivery themselves at factories and transfer houses.....	73,265.04	66,929.46
Total Sales.....		1,628,112.11	1,808,904.49
Percentage of sales filled by shipment or delivery from factories and transfer houses....		49.70%	52.55%
Fort Wayne		1935	1936
(a)	Sales of goods shipped from the branch house or delivery taken by buyer at branch house..	1,162,837.47	\$1,327,354.93
(b)	Sales of goods shipped or delivered by common carrier from factories and transfer houses direct to dealers and users.....	701,942.18	1,243,568.25
[fol. 154]			
(c)	Sales in which dealers and users took delivery themselves at factories and transfer houses.....	120,133.00	139,520.33
Total Sales.....		\$1,984,912.65	2,710,463.51
Percentage of sales filled by shipment or delivery from factories and transfer houses....		41.4%	51.00

Indianapolis

Similar figures for the Indianapolis branch are not available, as the records for 1935 and 1936 have been destroyed. And that is all the evidence introduced in this cause.

[fol. 155] Reporter's Certificate to foregoing transcript omitted in printing.

And Be It Further Remembered, That the foregoing Typewritten Transcript of the evidence, so taken and reported, as aforesaid, contains all the evidence given in said cause, with the objections made thereto, the rulings of the [fol. 156] court on said objections, and the exceptions taken thereto; and the same is now embodied in and made a part of a Bill of Exceptions.

ORDER SETTLING BILL OF EXCEPTIONS

And on the 3rd day of July, 1942, and within the time allowed by the Court so to do, the Defendants, tendered this, their Bill of Exceptions, No. 1, which contains the

Typewritten Transcript of the evidence, so taken as aforesaid, and prayed that the same might be signed, sealed and made a part of the record in this cause; which is accordingly done this 3rd day of July, 1942; and the same is ordered to be certified to by the Clerk of this Court, without copying, as a part of the record in this cause.

(Signed) Russell J. Ryan, Judge of the Superior Court of Marion County, Indiana, Room No. 3.

[File endorsements omitted.]

[fol. 157] IN SUPERIOR COURT OF MARION COUNTY

[Title omitted]

PRÆCIPE—Filed June 4, 1942

To the Clerk of the Marion Superior Court, Room Three:

You are hereby requested by the defendants in the above entitled cause to prepare and properly certify for use on appeal to the Supreme Court of Indiana transcript of the entire record in the above entitled cause, said transcript to include all papers and records, orders, rulings, exceptions, and proceedings made, taken, filed and had in the above entitled cause, including but not in limitation thereof, the following:

First: the summons, complaint and answer;

Second: the findings, judgment and decree of this Court;

[fol. 158] Third: the defendants' motion for a new trial and the ruling thereon;

Fourth: the defendants' prayer for an appeal and the ruling thereon;

Fifth: incorporation therein the transcript of the evidence;

Sixth: all pleadings, papers, orders, rulings and exceptions made and taken in said cause and the judgment rendered thereon;

Seventh: this praecipe and all other proper papers, records, orders, rulings and exceptions.

George N. Beamer, the Attorney General; Joseph P. McNamara, Deputy Attorney General; David I. Day, Jr., Deputy Attorney General; Byron B. Emswiler, Deputy Attorney General, Attorneys for Defendants.

[fol. 159] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 160] IN SUPERIOR COURT OF MARION COUNTY

[Title omitted]

NOTICE TO CLERK

To the Clerk of the Marion Superior Court, Room Three:

You are hereby notified that the defendants in the above entitled cause will appeal to the Supreme Court of Indiana from the judgment rendered against said defendants by the Marion Superior Court, Room Three, in the above entitled cause on the 29th day of April, 1942.

(Signed) George N. Beamer, The Attorney General,
[fol. 161] (Signed) Joseph P. McNamara, Deputy
Attorney General. (Signed) David I. Day, Jr.,
Deputy Attorney General. (Signed) Byron B.
Emswiler, Deputy Attorney General, Attorneys
for Defendants.

Receipt of the foregoing Notice is acknowledged this 4th day of June 1942.

(Signed) Charles R. Ettinger, Clerk of Marion Superior Court, Room Three.

[fol. 162] IN SUPERIOR COURT OF MARION COUNTY

[Title omitted]

NOTICE TO PLAINTIFFS

To: Edward R. Lewis, Baker, Daniels, Wallace & Seagle, Attorneys for Plaintiffs, International Harvester Company and International Harvester Company of America, Plaintiffs:

You are hereby notified that the defendants in the above entitled cause will appeal to the Supreme Court of Indiana from the judgment rendered against said defendants in

the Marion Superior Court, Room Three, in the above entitled cause on the 29th day of April, 1942.

[fol. 163] (Signed) George N. Beamer, The Attorney General. (Signed) Joseph P. McNamara, Deputy Attorney General. (Signed) David I. Day, Jr., Deputy Attorney General. (Signed) Byron B. Emswiler, Deputy Attorney General, Attorneys for Defendants.

Receipt of the foregoing Notice is acknowledged this 5th day of June, 1942.

(Signed) Baker, Daniels, Wallace & Seagle, by War-rack Wallace, Attorneys for Plaintiffs.

[fol. 164] IN SUPREME COURT OF INDIANA

[Title omitted]

ORDER OF SUBMISSION—August 27, 1942

Come now the parties by counsel and the court being advised in the premises, submits the above entitled cause under rule 2-14.

IN SUPREME COURT OF INDIANA

MINUTE ENTRIES

And afterwards, to-wit: On the 25th day of September, 1942, the same being the 107th judicial day of the May Term, 1942, of the Supreme Court, the following proceedings were had in said cause, to-wit:

[Title omitted]

Come now the appellants by counsel and file herein their brief (9) and a receipt for a copy from appellees, which brief is in the words and figures following, to-wit: (H. I.)

And afterwards, to-wit: On the 26th day of October, 1942, the same being the 133rd judicial day of the May Term, 1942, of the Supreme Court, the following proceedings were had in said cause, to-wit:

[Title omitted]

[fol. 165] EXCERPTS FROM APPELLEES' BRIEF

Come now the appellees by counsel and file herein their brief (9) and receipt for copy from appellants, which brief

is in the words and figures following, to-wit: (H. I.) Points II, III, IV and V being in the words and figures following:

II

A tax on Class C sales would be a burden on transactions in interstate commerce forbidden by the Commerce Clause.

III

A tax on Class D sales would be a burden on transactions in interstate commerce forbidden by the Commerce Clause.

IV

Class E sales are sales in interstate commerce and to levy a gross income tax on gross receipts therefrom would be to cast an unconstitutional burden on interstate commerce.

V

A tax on appellees' gross receipts from sales in Classes A, C, D or E would be a tax on property and business located outside the State of Indiana and would be in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

[fol. 166]

IN SUPREME COURT OF INDIANA

[Title omitted]

APPELLEES' ASSIGNMENT OF CROSS-ERRORS—Filed October 26, 1942

Appellees, International Harvester Company and International Harvester Company of America say that there is manifest error in the proceedings and judgment below in this, to-wit:

1. The Court erred in adjudging that appellees are not entitled to recover from appellants on account of taxes collected from appellees upon receipts from retail sales in

Class E or upon receipts from wholesale sales in less than [fol. 167] carload lots in Class E, because:

(a) The decision of the Court is not sustained by sufficient evidence.

(b) The decision of the Court is contrary to law.

Wherefore the appellees respectfully pray that the judgment below as to said Class E sales be reversed.

(Signed) Edward R. Lewis, Baker, Daniels, Wallace & Seagle, by Paul N. Rowe, Attorneys for appellees.

[fol. 168] [File endorsement omitted]

IN SUPREME COURT OF INDIANA

MINUTE ENTRIES

And comes now the appellees by counsel and file herein their request for oral argument, which request is in the words and figures following, to-wit: (H.L.)

And afterwards, to-wit: On the 7th day of November, 1942, the same being the 144th judicial day of the May Term, 1942, of the Supreme Court, the following proceedings were had in said cause, to-wit:

[fol. 169] [Title omitted]

Come now the appellants by counsel and file herein their reply brief (9) and receipt for copy of appellees, which brief is in the words and figures following, to-wit: (H.L.)

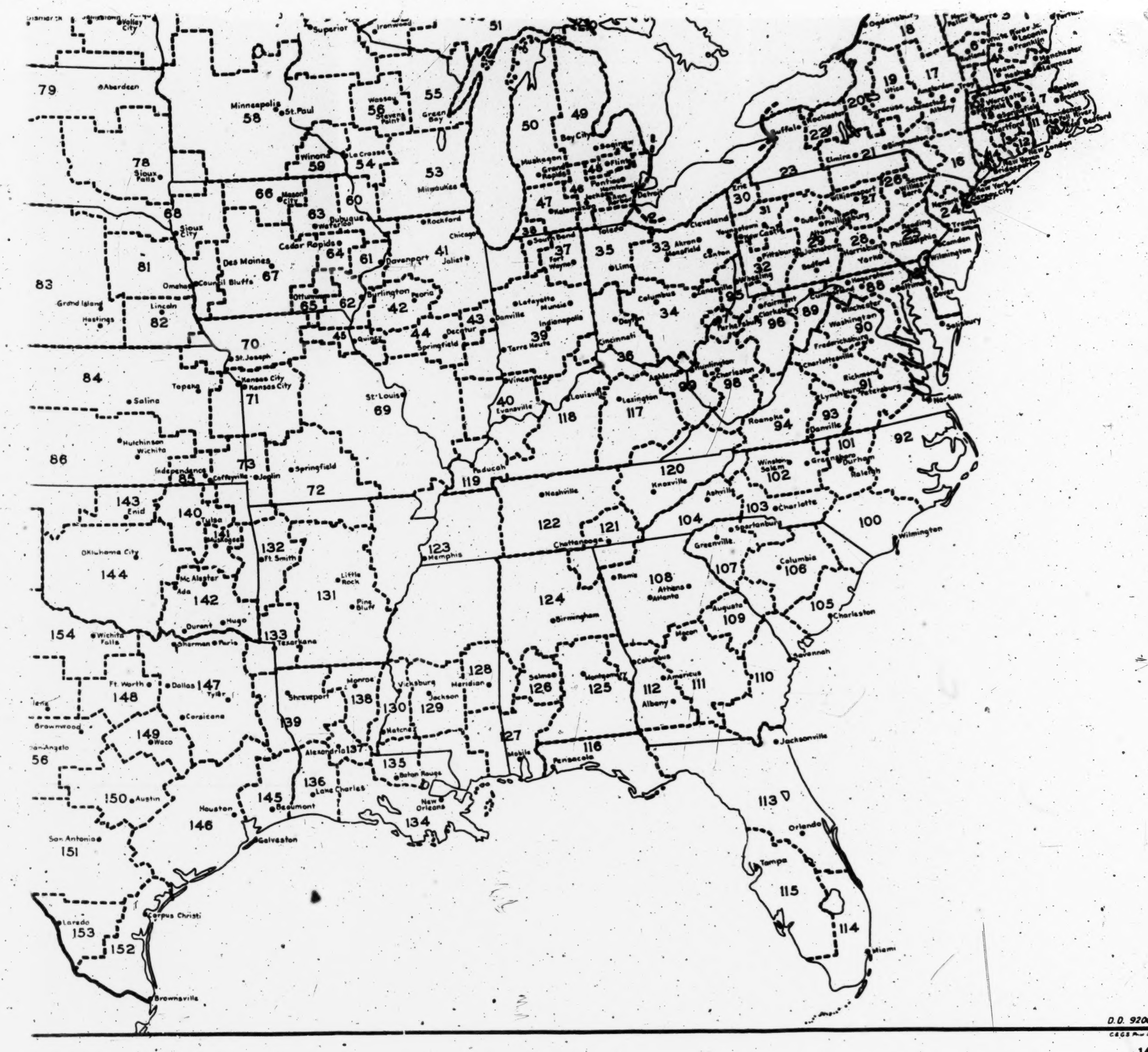
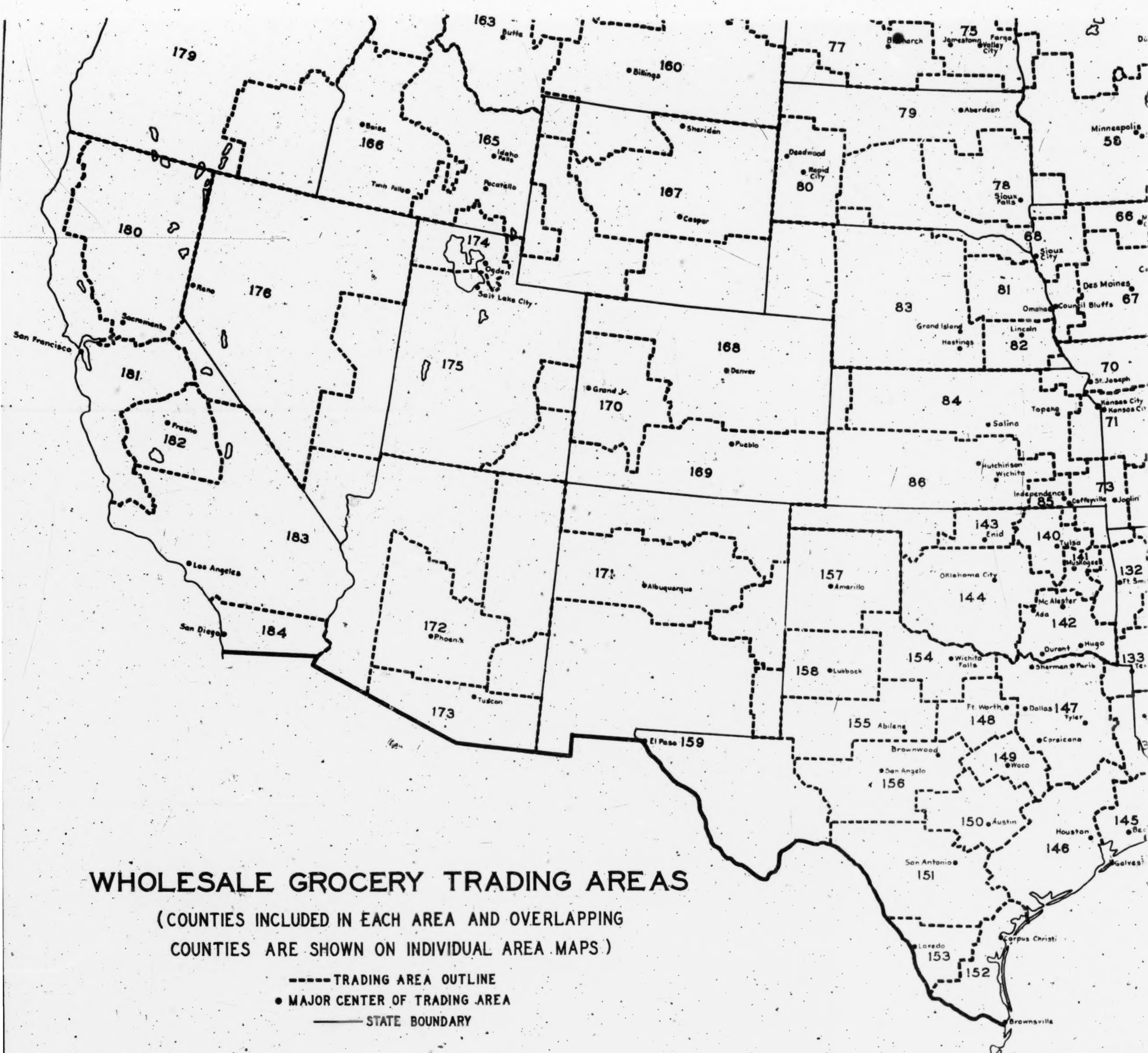
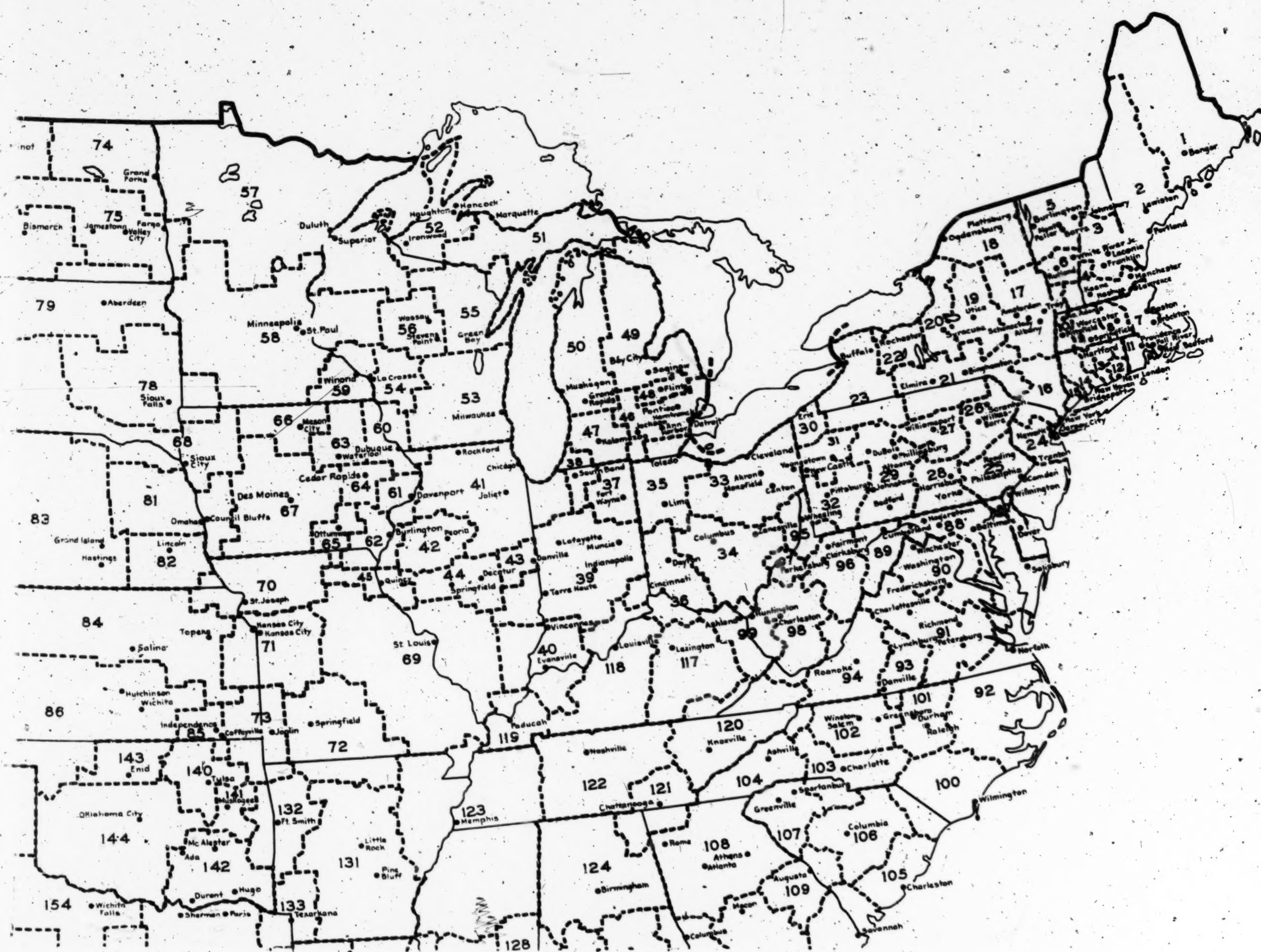
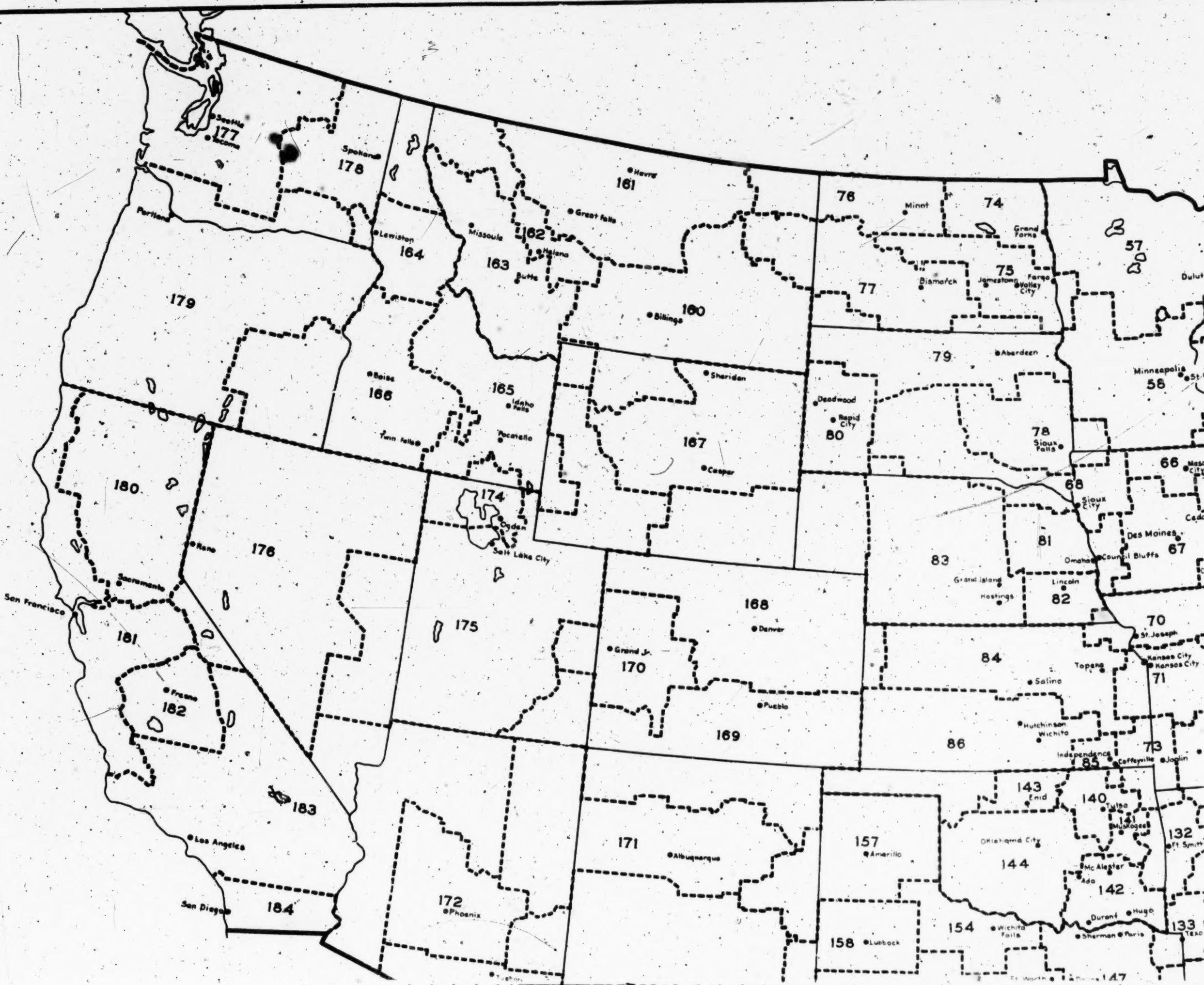
IN SUPREME COURT OF INDIANA

[Title omitted]

ORDER SETTING CAUSE FOR ORAL ARGUMENT

Come now the parties by counsel and the court being advised in the premises, sets the oral argument for December 15, 1942, at two o'clock P. M. with one hour being allowed on each side.

And afterwards, to-wit: On the 24th day of February, 1943, the same being the 81st judicial day of the November



WHOLESALE GROCERY TRADING AREAS

(COUNTIES INCLUDED IN EACH AREA AND OVERLAPPING COUNTIES ARE SHOWN ON INDIVIDUAL AREA MAPS)

- TRADING AREA OUTLINE
- MAJOR CENTER OF TRADING AREA
- STATE BOUNDARY

Term, 1942, of the Supreme Court, the following proceedings were had in said cause, to-wit:

[Title omitted]

[fol. 170] Come now the appellants by counsel and file herein their additional authorities (9) and receipt for copy from appellees, which authorities are in the words and figures following, to-wit: (H.L.)

[fol. 171] IN THE SUPREME COURT OF INDIANA

No. 27767

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, Joseph M. Robertson and Frank G. Thompson, as and Constituting the Department of Treasury of the State of Indiana, Appellants,

v.

INTERNATIONAL HARVESTER COMPANY, AND INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appellees.

Appeal from the Marion Superior Court, Room Three

OPINION—Filed March 19, 1943

SHAKE, J.:

The appellees sued to recover Gross Income Taxes paid to the State of Indiana during the years 1935 and 1936. It was stipulated at the trial that judgment for any amount found due should be in favor of the appellee, International Harvester Company, and that, for the purposes of the case, the appellees should be considered as one party.

[fol. 172] The evidence disclosed, without conflict, that the appellees were corporations organized under the laws of other states but authorized to do business in Indiana. They were engaged in the manufacture of farm implements and in the sale of their products both at wholesale and retail. Manufacturing establishments were maintained at Richmond and Fort Wayne, and selling branches at Indianapolis, Terre Haute, Fort Wayne, and Evansville in this state. There were also numerous manufacturing plants

and sales branches in adjoining states and elsewhere. Each branch served assigned territory and in several instances parts of Indiana were within the exclusive jurisdiction of branch offices located without the state.

The trial court determined the tax liability of the appellees under four factual situations, designated as Classes A, C, D, and E. The nature of these transactions may be stated as follows:

Class A: Sales by branches located outside Indiana to dealers and users located in Indiana. These sales were made on orders solicited in Indiana by representatives of out-of-state branches, or upon mail orders sent from Indiana to out-of-state branches. The orders were accepted by the outside state branch offices and the purchase money paid to them. Without directions from the purchasers, the goods were shipped to them in Indiana from branches, warehouses, or factories located outside Indiana.

Class C: Sales by branches located outside Indiana to dealers and users residing in Indiana. The orders were solicited in Indiana and the customers took delivery to themselves at the factories in Indiana to save time and expense of shipping.

Class D: Sales by branches located in Indiana to dealers [fol. 173] and users residing outside of Indiana, in which the customers came to Indiana and accepted delivery to themselves in this state.

Class E: Sales by branches located in Indiana to dealers and users residing in Indiana, in which the goods were shipped from points outside Indiana to customers in Indiana, pursuant to contracts so providing.

The court below found that the appellees were entitled to a refund of taxes paid upon A, C, and D transactions, but not for those under Class E. By properly assigned errors and cross-errors each of these findings is challenged.

Much of the briefs were devoted to the subject of the interstate attributes of the transactions. We consider these discussions beside the issues. Interstate commerce is not to be exempted from this tax unless it is imposed in such a manner as to lead to the possibility of double or multiple burdens. The Supreme Court of the United States held in *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307, 82

L. Ed. 1365, 58 S. Ct. 913, 117 A.L.R. 429, that this tax could not be imposed upon a domestic corporation with its principal office and place of business in this state, for gross income derived from the sale of its products to customers in other states. The court said that, "the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold, as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids." In *Department of Treasury v. Allied Mills, Inc.* (1942), Ind., 42 N. E. (2d) 34, we interpreted the Adams case as meaning that the tax may be levied by the buyer's state regardless of the incidental interstate nature of the transaction. This view was sustained by the Supreme Court. *Allied Mills, Inc. v. Department of Treasury* (1943), — U. S. —, — L. Ed. —, — S. Ct. —.

Applying the above decisions to the case at bar, it seems clear that transactions under Classes C, D, and E are subject to our Gross Income Tax. Neither of these classes presents a possibility of double taxation, since no other state could impose such a burden in view of the conclusions reached in the J. D. Adams case.

Class A presents a different problem. Section 2 of Ch. 50, Acts 1933, §64-2602, Burns' 1933, §15982, Baldwin's 1934, which was in force during 1935 and 1936, provided:

"Such tax shall be levied upon the entire gross income of all residents of the state of Indiana, and upon the gross income derived from sources within the state of Indiana, of all persons and/or companies, including banks, who are not resident of the state of Indiana, but are engaged in business in this state, or who derived gross income from sources within this state. . . ."

It was beyond the power of the treasury department to broaden the tax base established by this statute by administrative regulations. In *Department of Treasury v. Muessel* (1941), 218 Ind. 250, 34, 32 N. E. (2d) 596, this court said:

"Unless the transaction comes clearly within one of the provisions of this definition it cannot be taxed as gross income. It is a settled rule of statutory construction that

statutes levying taxes are not to be extended by implications beyond the clear import of the language used, in order to enlarge their operation, so as to embrace transactions [fol. 175] not specifically pointed out. In case of doubt such statutes are to be construed more strongly against the state and in favor of the citizen."

The appellants would have us construe the statute as exempting only income derived *entirely from activities* outside of Indiana. This would distort the clear import of the language employed and violate the rule stated above. Under Class A the orders upon which the goods were sold were accepted outside the confines of Indiana; and payment was made to branches in other states. There was no showing of a tax evasion. We cannot say that income so received by the appellees was "derived from sources within the State of Indiana." Perhaps we should call attention to the fact that §2 of the Gross Income Tax of 1933 has since been amended. Acts 1937, Ch. 117, §2, p. 604, §64-2602, Burns' 1933 (Supp.), §15982, Baldwin's supp. 1937.

The judgment is affirmed as to Class A and E transactions, and reversed as to Classes C and D. The Superior Court of Marion County, Room 3, will sustain the appellants' motion for a new trial and enter a judgment as indicated by this opinion. The costs are adjudged equally against the parties.

[fol. 176] [File endorsement omitted.]

[fol. 177] IN SUPREME COURT OF INDIANA

[Title omitted]

APPELLANTS' PETITION FOR REHEARING—Filed March 29, 1943

Pursuant to Rule 2-22 of the Rules of the Court the Appellants herein respectfully petition the Court for a rehearing in the above-entitled appeal because the decision of the Court, made on March 19, 1943, holding that Appellees were not subject to the Indiana Gross Income Tax (Chap. 50, Acts of 1933), measured by Appellees' gross

receipts from their Class A Sales transactions reflected in the Record, is erroneous for each of the following reasons:

(1) The Commerce Clause of the Constitution does not [fol. 178] prohibit the application of the state tax, measured by such gross receipts;

(2) The decision of the Court in the case of *Department of Treasury et al. v. Allied Mills, Inc.* (1942), not yet officially reported, 42 N. E. (2d) 34, (Affirmed per curiam, U. S. Supreme Court, 63 S. Ct. 666), unless overruled, should control the decision in this case with reference to said Class A Transactions;

(3) The decision of March 19, 1943, with reference to Class A transactions, holds that the Department attempted to broaden the application of the taxing statute by regulation. No regulation ever promulgated by the Department applies to transactions such as Appellees' Class A transactions;

(4) The decision of March 19, 1943, with reference to Class A transactions, is erroneous in so far as it holds that the substance and effect of Section 2 of Chapter 50 of the Acts of 1933 was changed by the amendment thereof by Chapter 117 of the Acts of 1937;

(5) The decision of March 19, 1943 with reference to Class A transactions, is erroneous in so far as it holds that the place of acceptance of orders is material in determining liability for taxes, measured by gross receipts from sales, under the taxing Act involved;

(6) The decision of March 19, 1943 with reference to Class A transactions, is erroneous in so far as it holds that the place where payment was made is material in determining liability for taxes, measured by gross receipts for sales, under the taxing Act in question;

(7) The decision of March 19, 1943, with reference to Class A transactions is erroneous in so far as it holds the question of "tax evasion" is material in determining [fol. 179] liability for taxes under the taxing Act in question;

(8) The decision of March 19, 1943, is erroneous in holding that Appellees' gross receipts from their Class A sales

transactions were not from sources within the State of Indiana;

(9) The decision of March 19, 1943, erroneously holds that Appellees were not subject to the Gross Income Tax Act of 1933, so far as their receipts from Class A transactions are concerned.

Respectfully submitted, (Signed) James A. Emmert, Attorney General; (Signed) David I. Day, Jr., Deputy Attorney General; (Signed) Byron B. Emswiler, Deputy Attorney General, Attorneys for Appellants.

141 South Meridian St., Indianapolis, Indiana.

[fol. 180] [File endorsement omitted.]

Come now the appellants by counsel and file herein their proof of service from appellees, together with brief (9) in support of their petition for rehearing, which brief is in the words and figures following, to-wit: (H. I.)

[fol. 181] IN SUPREME COURT OF INDIANA

[Title omitted]

APPELLEES' PETITION FOR REHEARING—Filed April 8, 1943

The Appellees, International Harvester Company and International Harvester Company of America, respectfully petition the Court to grant a rehearing of its decision entered March 19, 1943 so far as said decision reverses the judgment of the trial court as to the taxes on sales in Class C and Class D involved in this appeal, and so far as it involves the affirmance of said judgment as to the tax on sales in Class E, and to modify said decision so as to affirm said judgment as to the taxes on Classes C and D and to reverse said judgment with respect to the taxes on sales in Class E, for the following reasons:

[fol. 182]

I

The taxes in Classes C, D and E are not taxes on the consumer on sales to the consumer conditioned on a local activity in Indiana but are taxes on the seller, a foreign cor-

poration, laid on gross receipts from wholesale sales as well as retail sales and involves the possibility of multiple tax burdens.

II

On the theory adopted by the Court that the buyer's state may lay the tax, the tax in Class D cannot be laid by Indiana because the buyer's state is outside Indiana.

III

The receipts from sales in Classes C, D and E are in large part derived from activities and sources outside Indiana and for that reason a gross receipts tax on the entire receipts in such Classes, unapportioned and not limited to amounts attributable to Indiana activities and sources, is prohibited by the due process clause of the fourteenth amendment to the federal constitution.

IV

The principal receipt producing activities in respect to the sales in Classes C and E and the principal source of such receipts were outside of Indiana and therefore the receipts from said sales are not from a source within Indiana under Section 2 of the Indiana gross income tax act of 1933 and are not subject to tax to appellees, foreign corporations.

Wherefore, appellees respectfully pray that the Court grant a rehearing of this cause and upon such rehearing modify its prior decision as above indicated.

International Harvester Company and International Harvester Company of America by (Signed) Ed-
[fol. 183] ward R. Lewis, Warrack Wallace, Paul
N. Rowe, Its Attorneys.

[File endorsement omitted.]

4/11/43 Petition denied (Signed) F. N. Richman C. J.

[fol. 184]

RECEIPT

Receipt is hereby acknowledged this 8th day of April, 1943, of a copy of Appellees' Petition for Rehearing and Brief in Support Thereof and Appellees' Brief in Reply

to Appellants' Brief in Support of Appellants' Petition for Rehearing.

(Signed) James A. Emmert, Attorney General;
 (Signed) David I. Day, Jr., Deputy Atty. General;
 (Signed) Byron B. Emswiler, Deputy Atty. General, Attorneys for Appellants.

[fol. 185] IN SUPREME COURT OF INDIANA

MINUTE ENTRIES

Come now the appellees by counsel and file herein their brief (9) on petition for rehearing, which brief is in the words and figures following, to-wit: (H. I.)

And come now the appellees by counsel and file herein their brief (9) in reply to appellants' brief in support of petition for rehearing, which brief is in the words and figures following, to-wit: (H. I.)

And afterwards, to-wit: On the 16th day of April, 1943, the same being the 125th judicial day of the November Term, 1942, of the Supreme Court, the following proceed-[fol. 186] ings were had in said cause, to-wit:

Department of Treasury, etc, et al Appellants,

vs.

International Harvester Co., et al Appellees.

No. 27767

Come now the appellants by counsel and file herein their brief (9) in reply to appellees' brief in support of appellees' petition for rehearing and receipt for copy of appellees, which brief is in the words and figures following, to-wit: (H. I.)

IN SUPREME COURT OF INDIANA

[Title omitted]

ORDER DENYING PETITIONS FOR REHEARING—May 11, 1943

Come now the parties by counsel and the court being advised in the premises, denies appellants' petition for rehearing.

And the court being further advised in the premises, denies appellees' petition for rehearing.

[fol. 187] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR RECORD AND DESIGNATION OF PORTIONS OF RECORD TO BE INCORPORATED INTO TRANSCRIPT

To: The Clerk of the Supreme Court of the State of Indiana:

You are hereby requested to prepare, certify and transmit to the Clerk of the Supreme Court of the United States, in conjunction with the Petition for Appeal filed this day by the Appellants in the above entitled cause, a transcript of the record in this cause, prepared, certified and transmitted as required by statute and by the Rules of the Supreme Court of the United States, and to include in said transcript the entire record, proceedings, pleadings, orders, entries, stipulation, evidence, exhibits, etc., contained in the transcript filed with you by the Clerk of the Superior Court of Marion County, Indiana, Room No. 3, on the appeal of this cause from said Superior Court to the Supreme Court of Indiana. You will also please include in said transcript of record the complete proceedings in the Supreme Court of Indiana with Points II, III, IV and V of Appellees' Brief, and this Praecipe for Record and Designation of Portions of Record to be Incorporated Into Transcript.

[fol. 188] (Signed) Joseph J. Daniels, Edward R. Lewis, Paul N. Rowe, Attorneys for Appellees.

[fol. 189] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 190] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed August 9, 1943

Being aggrieved by the final decision of the Supreme Court of the State of Indiana in the above-entitled cause, the plaintiffs therein, now appellants, International Harvester Company and International Harvester Company of

America, hereby pray that an appeal therefrom be allowed to the Supreme Court of the United States of America.

In support of this petition for appeal appellants assign the following errors in the record and proceedings in said case:

1. The Supreme Court of the State of Indiana erred in holding that the receipts of appellants from sales in Class C transactions are subject to the Indiana Gross Income Tax; and in refusing to hold that said tax on said receipts is an invalid and prohibited burden on interstate commerce under the commerce clause of the Constitution of the United States.

2. The Supreme Court of the State of Indiana erred in holding that the entire gross receipts of appellants from sales in Class C transactions are subject to the Indiana [fol. 191] Gross Income Tax without apportionment of said receipts between that part thereof derived from sources in Indiana and that part thereof derived from sources outside Indiana, and without limiting the application of said tax to that part of said receipts derived from Indiana sources; and in refusing to hold that said tax as applied to said receipts from Class C transactions is invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of the State of Indiana erred in holding that the receipts of appellants from sales in Class D transactions are subject to the Indiana Gross Income Tax; and in refusing to hold that said tax on said receipts is an invalid and prohibited burden on interstate commerce under the commerce clause of the Constitution of the United States.

4. The Supreme Court of the State of Indiana erred in holding that the entire gross receipts of appellants from sales in Class D transactions are subject to the Indiana Gross Income Tax without apportionment of said receipts between that part thereof derived from sources in Indiana and that part thereof derived from sources outside Indiana, and without limiting the application of said tax to that part of said receipts derived from Indiana sources; and in refusing to hold that said tax as applied to said receipts from Class D transactions is invalid under the due process clause

of the Fourteenth Amendment to the Constitution of the United States.

5. The Supreme Court of the State of Indiana erred in holding that the receipts of appellants from sales in Class E transactions are subject to the Indiana Gross Income [fol. 192] Tax; and in refusing to hold that said tax on said receipts is an invalid and prohibited burden on interstate commerce under the commerce clause of the Constitution of the United States.

6. The Supreme Court of the State of Indiana erred in holding that the entire gross receipts of appellants from sales in Class E transactions are subject to the Indiana Gross Income Tax without apportionment of said receipts between that part thereof derived from sources in Indiana and that part thereof derived from sources outside Indiana, and without limiting the application of said tax to that part of said receipts derived from Indiana sources; and in refusing to hold that said tax as applied to said receipts from Class E transactions is invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

For which errors appellants pray that said judgment of the Supreme Court of the State of Indiana entered March 19, 1943, in the above-entitled cause, be reversed and a judgment rendered in favor of said appellants, and for costs.

Joseph J. Daniels, Edward R. Lewis, Paul N. Rowe,
Counsel for Appellants.

Baker, Daniels, Wallace & Seagle, of Counsel.

[fol. 192a] [File endorsement omitted.]

[fol. 193] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed August 9, 1943

In support of their petition for appeal in the above entitled cause to the Supreme Court of the United States, the plaintiffs therein, now appellants, International Harvester

Company and International Harvester Company of America, hereby assign the following errors in the record and proceedings in said case:

1. The Supreme Court of the State of Indiana erred in holding that the receipts of appellants from sales in Class C transactions are subject to the Indiana Gross Income Tax; and in refusing to hold that said tax on said receipts is an invalid and prohibited burden on interstate commerce under the commerce clause of the Constitution of the United States.

2. The Supreme Court of the State of Indiana erred in holding that the entire gross receipts of appellants from sales in Class C transactions are subject to the Indiana Gross Income Tax without apportionment of said receipts between that part thereof derived from sources in Indiana [fol. 194] and that part thereof derived from sources outside Indiana, and without limiting the application of said tax to that part of said receipts derived from Indiana sources; and in refusing to hold that said tax as applied to said receipts from Class C transactions is invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of the State of Indiana erred in holding that the receipts of appellants from sales in Class D transactions are subject to the Indiana Gross Income Tax; and in refusing to hold that said tax on said receipts is an invalid and prohibited burden on interstate commerce under the commerce clause of the Constitution of the United States.

4. The Supreme Court of the State of Indiana erred in holding that the entire gross receipts of appellants from sales in Class D transactions are subject to the Indiana Gross Income Tax without apportionment of said receipts between that part thereof derived from sources in Indiana and that part thereof derived from sources outside Indiana, and without limiting the application of said tax to that part of said receipts derived from Indiana sources; and in refusing to hold that said tax as applied to said receipts from Class D transactions is invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

5. The Supreme Court of the State of Indiana erred in holding that the receipts of appellants from sales in Class E transactions are subject to the Indiana Gross Income Tax; and in refusing to hold that said tax on said receipts is an invalid and prohibited burden on interstate commerce under the commerce clause of the Constitution of the United States.

[fol. 195] 6. The Supreme Court of the State of Indiana erred in holding that the entire gross receipts of appellants from sales in Class E transactions are subject to the Indiana Gross Income Tax without apportionment of said receipts between that part thereof derived from sources in Indiana and that part thereof derived from sources outside Indiana, and without limiting the application of said tax to that part of said receipts derived from Indiana sources; and in refusing to hold that said tax as applied to said receipts from Class E transactions is invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Joseph J. Daniels, Edward R. Lewis, Paul N. Rowe,
Counsel for Appellants.

Baker, Daniels, Wallace & Seagle, of Counsel.

[fols. 195a-198] [File endorsement omitted.]

[fol. 199] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed August 9, 1943

The appellants in the above-entitled cause, and each of them, having this day filed their petition herein praying for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above-entitled cause by the Supreme Court of the State of Indiana on the 19th day of March, 1943, and from each and every part of said judgment adverse to said appellants, and having presented and filed their petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction, pursuant to the statutes and to the

rules of the Supreme Court of the United States in such case made and provided;

It is therefore now Ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Indiana in the above-entitled cause, as provided by law, and it is further Ordered that the Clerk of the Supreme Court of the State of Indiana shall prepare and certify a transcript of the record, proceedings and judgment in this cause in accordance with the rules of the Supreme Court of the [fol. 200] United States and transmit the same to the Supreme Court of the United States, so that said transcript shall be filed with said Court within forty (40) days of this date.

And it is further Ordered that security for costs on appeal be fixed in the sum of Two Hundred Fifty Dollars (\$250.00) bond for which, with Fidelity and Deposit Company of Maryland, as surety thereon, is now presented by appellants, is approved and ordered filed with the Clerk of this Court.

Entered at Indianapolis, Indiana, this 9th day of August, 1943.

H. Nathan Swaim, Chief Justice of the Supreme Court of the State of Indiana.

[fol. 200a] [File endorsement omitted.]

[fol. 201] Citation in usual form, filed Aug. 9, 1943, omitted in printing.

[fol. 202] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR RECORD AND DESIGNATION OF PORTIONS OF
RECORD TO BE INCORPORATED INTO TRANSCRIPT

To The Clerk of the Supreme Court of the State of Indiana:

You are hereby requested to prepare, certify and transmit to the Clerk of the Supreme Court of the United States, in conjunction with the Petition for Appeal filed this day by the Appellants in the above entitled cause, a transcript of the record in this cause, prepared, certified and trans-

mitted as required by statute and by the Rules of the Supreme Court of the United States, and to include in said transcript the entire record, proceedings, pleadings, orders, entries, stipulation, evidence, exhibits, etc., contained in the transcript filed with you by the Clerk of the Superior Court of Marion County, Indiana Room No. 3, on the appeal of this cause from said Superior Court to the Supreme Court of Indiana. You will also please include in said transcript of record the complete proceedings in the Supreme Court of Indiana with Points II, III, IV and V of Appellees' Brief, and this Praecipe For Record and Designation of Portions of Record to be Incorporated Into Transcript.

Joseph J. Daniels, Edward R. Lewis, Paul N. Rowe,
Attorneys for Appellants.

[fol. 203] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 204] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANTS
AND DESIGNATION BY APPELLANTS OF THE PARTS OF THE
RECORD TO BE PRINTED, WITH PROOF OF SERVICE THEREOF—
Filed September 16, 1943

Pursuant to Rule 13, Paragraph 9, of this Court, Appellants state that the points upon which they intend to rely in this appeal are as follows:

1. The Supreme Court of the State of Indiana erred in holding that the receipts of appellants from sales in Class C transactions are subject to the Indiana Gross Income Tax; and in refusing to hold that said tax on said receipts is an invalid and prohibited burden on interstate commerce under the commerce clause of the Constitution of the United States.

2. The Supreme Court of the State of Indiana erred in holding that the entire gross receipts of appellants from sales in Class C transactions are subject to the Indiana Gross Income Tax without apportionment of said receipts between that part thereof derived from [fol. 205] sources in Indiana and that part thereof derived from sources outside Indiana, and without limit-

ing the application of said tax to that part of said receipts derived from Indiana sources; and in refusing to hold that said tax as applied to said receipts from Class C transactions is invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of the State of Indiana erred in holding that the receipts of appellants from sales in Class D transactions are subject to the Indiana Gross Income Tax; and in refusing to hold that said tax on said receipts is an invalid and prohibited burden on interstate commerce under the commerce clause of the Constitution of the United States.

4. The Supreme Court of the State of Indiana erred in holding that the entire gross receipts of appellants from sales in Class D transactions are subject to the Indiana Gross Income Tax without apportionment of said receipts between that part thereof derived from sources in Indiana and that part thereof derived from sources outside Indiana, and without limiting the application of said tax to that part of said receipts derived from Indiana sources; and in refusing to hold that said tax as applied to said receipts from Class D transactions is invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

5. The Supreme Court of the State of Indiana erred in holding that the receipts of appellants from sales in Class E transactions are subject to the Indiana Gross Income Tax; and in refusing to hold that said tax on said receipts is an invalid and prohibited burden on [fol. 206] interstate commerce under the commerce clause of the Constitution of the United States.

6. The Supreme Court of the State of Indiana erred in holding that the entire gross receipts of appellants from sales in Class E transactions are subject to the Indiana Gross Income Tax without apportionment of said receipts between that part thereof derived from sources in Indiana and that part thereof derived from sources outside Indiana, and without limiting the application of said tax to that part of said receipts derived from Indiana sources; and in refusing to hold that said tax as applied to said receipts from Class E transac-

tions is invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Appellants further state that the entire transcript of record, as prepared by the Clerk of the Court below, is necessary for the consideration of the foregoing Statement of points and is hereby designated to be printed by the Clerk of this Court, except the following designated parts of said transcript of record which are not necessary for the consideration of said Statement of Points and should be omitted from the printed record herein, viz.:

1. Appellants' jurisdictional statement appearing in Volume II of said transcript of record.
2. Appellants' bond for costs appearing in Volume II of said transcript of record.

Joseph J. Daniels, Edward R. Lewis, Paul N. Rowe,
Attorneys for Appellants.

[fol. 207] .

PROOF OF SERVICE

STATE OF INDIANA,

County of Marion, ss:

Paul N. Rowe, being first duly sworn, upon oath says:

That on the 14th day of September, 1943, he served on James A. Emmert, Attorney General of the State of Indiana, a true copy of the above and foregoing Statement of Points to be Relied Upon by Appellants and Designation by Appellants of the Parts of the Record to be Printed, with Proof of Service Thereof, as evidenced by the receipt therefor appearing below signed in his presence by said James A. Emmert, as said Attorney General.

Paul N. Rowe.

Subscribed and sworn to before me, the undersigned, a Notary Public in and for said County and State this 14th day of September, 1943. Witness my hand and Notarial Seal. Irma Cox, Notary Public, Marion County, Indiana. My commission expires: June 9, 1946. (Seal.)

Receipt

Receipt of a true copy of the foregoing Statement of Points to be Relied Upon by Appellants and Designation by Appellants of the Parts of the Record to be Printed, with Proof of Service Thereof is hereby acknowledged this 14th day of September, 1943.

James A. Emmert, Attorney General of the State of
Indiana, Attorney for Appellees.

[fol. 207a] [File endorsement omitted.]

[fol. 208] SUPREME COURT OF THE UNITED STATES

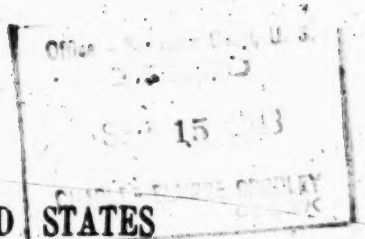
ORDER NOTING PROBABLE JURISDICTION—October 25, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 47,848. Indiana Supreme Court. Term No. 355. International Harvester Company and International Harvester Company of America, Appellants, vs. Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson, et al., etc. Filed September 15, 1943. Term No. 355 O. T. 1943.

(8928)

FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 355

**INTERNATIONAL HARVESTER COMPANY AND
INTERNATIONAL HARVESTER COMPANY OF
AMERICA,**

vs.

Appellants,

**DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERT-
SON, AND FRANK G. THOMPSON, AS MEMBERS OF AND CONSTI-
TUTING THE BOARD OF DEPARTMENT OF TREASURY.**

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA.

STATEMENT AS TO JURISDICTION.

**JOSEPH J. DANIELS,
EDWARD R. LEWIS,
PAUL N. ROWE,**
Attorneys for Appellants.

TABLE OF CONTENTS

	Page
Basis of Jurisdiction.....	2
The State Statute Involved.....	2
Date of Judgment Sought to be Reviewed and Date of Presentation of Application for Review.....	4
Finality of Judgment.....	4
Nature of the Case.....	5
The Federal Questions Involved are Substantial.....	9
The Federal Questions in Class C Sales are Sub- stantial.....	14
The Federal Questions in Class D Sales are Sub- stantial.....	16
The Federal Questions in Class E Sales are Sub- stantial.....	19
The Manner in which the Federal Questions Were Raised.....	20
Cases Believed to Sustain Jurisdiction.....	23
Appendix A—Opinion of the Supreme Court of Indiana.....	24

TABLE OF CASES

<i>Adams Mfg. Co. v. Storen</i> , 304 U. S. 307.....	9, 23
<i>Allied Mills, Inc. v. Department of Treasury</i> , 87 L. Ed. 514, 63 Sup. Ct. 666.....	10
<i>Citizens Bank of Michigan City v. Opperman</i> , 249 U. S. 448.....	4
<i>Commissioner of Corporations v. Ford Motor Co.</i> , 308 U. S. 558, 33 N. E. (2) 318.....	16, 19
<i>Cooney v. Mountain States Telephone & Telegraph Co.</i> , 294 U. S. 284.....	15
<i>Curless v. Watson</i> , 180 Ind. 86.....	4
<i>Dahnke-Walker Milling Co. v. Bondurant</i> , 257 U. S. 282.....	18, 23
<i>Department of Treasury v. Allied Mills</i> , 42 N. E. (2) 34..	
<i>Department of Treasury v. International Harvester Co.</i> , 47 N. E. (2) 150 Ind. Sup. Ct.....	2
<i>Felt & Tarrant Mfg. Co. v. Gallagher</i> , 306 U. S. 62.....	11, 13
<i>Fisher's Blend Station v. Tax Commission</i> , 297 U. S. 282.....	14, 23

	Page
<i>Gibbons v. Ogden</i> , 9 Wheaton 1	14
<i>Gwin, White & Prince v. Henneford</i> , 305 U. S. 435	12, 23
<i>Hans Rees Sons v. North Carolina</i> , 283 U. S. 123	23
<i>Henneford v. Silas Mason Co.</i> , 300 U. S. 577	17
<i>McGoldrick v. Berwind-White Coal Mining Co.</i> , 309 U. S. 33	10
<i>McGoldrick v. DuGrenier, Inc.</i> , 309 U. S. 70	10
<i>McGoldrick v. Felt & Tarrant Mfg. Co.</i> , 309 U. S. 70	11, 13
<i>Newfield v. Ryan</i> , 91 Fed (2) 700, cert. den. 302 U. S. 729, Rehearing den. 302 U. S. 777	14
<i>Pensacola Telegraph Co. v. Western Union Telegraph Co.</i> , 96 U. S. 1	14
<i>Sonneborn Bros. v. Cureton</i> , 262 U. S. 506	19
<i>Standard Oil Co. v. Johnson</i> , 33 Cal. App. (2) 430, 92 Pac. (2) 470	19
<i>Storen v. J. D. Adams Mfg. Co.</i> , 212 Ind. 343, 7 N. E. (2) 941	3

CONSTITUTIONS AND STATUTES

Constitution of United States, Commerce Clause, Art. 1, Sec. 8	10
Constitution of United States, Fourteenth Amendment,	16, 20, 21
Indiana Constitution, Art. 7, Sec. 1	4
Sec. 237, Judicial Code, 28 U. S. C. 344	2
Act of January 31, 1928, Ch. 14, Sec. 1, 28 U. S. C. 861a	2
Indiana Statutes, Acts 1933, Ch. 50, p. 388	2
Indiana Statutes, Acts 1933, Ch. 50, Sec. 2	2
Indiana Statutes, Acts 1933, Ch. 50, Sec. 3	3
Indiana Statutes, Acts 1933, Ch. 50, Sec. 6	3
Indiana Statutes, Acts 1933, Ch. 50, Sec. 12	4
Ohio Statutes, General Code of Ohio, Sec. 5546-26	17

SUPREME COURT OF THE UNITED STATES

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INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERT-
SON, AND FRANK G. THOMPSON, AS MEMBERS OF AND CONSTI-
TUTING THE BOARD OF DEPARTMENT OF TREASURY.**

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA.

STATEMENT AS TO JURISDICTION.

Pursuant to the provisions of Rule No. 12 of the Supreme Court of the United States, Appellants file this Statement, showing that this Court has jurisdiction upon appeal to review the judgment in question.

This is an appeal from the judgment of the Supreme Court of Indiana in the cause of Department of Treasury of the State of Indiana, et al., Appellants, *vs.* International

Harvester Company, Appellee, reported in 47 N. E. (2) 150, wherein the Supreme Court of Indiana affirmed in part and reversed in part the judgment of Marion Superior Court, Room 3, in the cause wherein the International Harvester Company and International Harvester Company of America, as plaintiffs, brought suit to recover Indiana Gross Income Taxes paid by them on certain classes of sales fully described in the complaint therein. No opinion was delivered by the Superior Court. A copy of the opinion delivered by the Supreme Court of Indiana is appended hereto, as Appendix A.

Basis of Jurisdiction.

Section 237 of the Judicial Code (28 U. S. C. 344) gives jurisdiction for this appeal. It provides that a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court by writ of error. By Act of January 31, 1928, Chapter 14, Section 1 (28 U. S. C. 861a) the remedy by appeal has been substituted for writ of error in such cases.

The State Statute Involved.

The statute of the State of Indiana, the validity of which as applied to the Appellants herein is involved, is Chapter 50, Acts of 1933, State of Indiana, page 388, known as the Indiana Gross Income Tax Act of 1933. Section 2 of the Act of 1933, as in effect in the years 1935 and 1936 for which the taxes involved in this appeal were paid, provides as follows:

"Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the

amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

The Indiana Gross Income Tax Act of 1933 levied the above tax on gross income at varying rates of tax for various classes of gross income. By Section 3 of the Act the tax on gross receipts from wholesale sales was made $\frac{1}{4}$ of 1% and the tax on gross receipts from retail sales was levied at 1%. Wholesale sales are sales for resale. Retail sales are sales to the consumer. *Storen v. J. D. Adams Mfg. Co.*, 212 Ind. 343, 7 N. E. 2nd 941.

The Act makes no provision for the apportionment of gross receipts as respects gross receipts derived from sources partly within and partly without the State of Indiana.

Under Section 6 of the Act it is provided that "There shall be excepted from the gross income taxable under this Act:

"(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America. * * *"

Section 12 of the Act provides that relief against the assessment of tax thereunder may be had by payment of the tax and suit for refund thereof, which was the procedure followed in this case.

Date of Judgment Sought to Be Reviewed and Date of Presentation of Application for Review.

The date of the final decision and judgment in the Supreme Court of Indiana sought to be reviewed is May 11, 1943.

The original judgment and decision of the Supreme Court of Indiana was rendered on March 19, 1943.

Both Appellants below (Department of Treasury, et al.) and Appellees below (International Harvester Company, et al.) filed petitions for rehearing with the Supreme Court of Indiana. Both petitions for rehearing were denied by the Supreme Court of Indiana on May 11, 1943 (R. 186). The petition for appeal was presented to and allowed by Hon. H. Nathan Swaim, Chief Justice of the Supreme Court of Indiana on August 9, 1943.

Finality of Judgment.

The Supreme Court of Indiana is the highest court in the State of Indiana, and on its denial of the petitions for rehearing its judgment became final. Under the Constitution of Indiana, the Supreme Court of Indiana is the court of last resort in the state. (Constitution of the State of Indiana, Article 7, Section 1) *Curless v. Watson*, 180 Ind. 86.

The United States Supreme Court has held that the date from which the time for making application for appeal begins to run is the date, if a petition for rehearing is filed, when the petition for rehearing is denied. *Citizens Bank of Michigan City, Indiana v. Opperman*, 249 U. S. 448, 449.

Nature of the Case.

This appeal involves receipts from three classes of sales on which Indiana Gross Income Taxes were paid by the International Harvester Company and International Harvester Company of America for the years 1935 and 1936, the recovery of which taxes was denied by the Supreme Court of Indiana by its decision in this case.

The International Harvester Company is a New Jersey corporation with general offices in Chicago, Illinois (R. 43). The International Harvester Company of America was a Wisconsin corporation, all the capital stock of which was owned by the International Harvester Company, the parent company (R. 43). In 1935 the International Harvester Company of America marketed in Indiana the products manufactured by the International Harvester Company (R. 44). In 1936 the International Harvester Company marketed its own products directly, and the International Harvester Company of America has since been dissolved (R. 44). By stipulation of the parties, it was agreed that the International Harvester Company should be treated as the sole plaintiff in this action (R. 44).

All the sales of the International Harvester Company are made through its selling branches. No sales are made by the factories. The sales are made by the branches on orders received by the branches by mail, or solicited by their salesmen. All orders are subject to approval and acceptance by the Company's branch manager of the branch making the sale. The goods are shipped to the buyer from the branch house or the factory or a general transfer warehouse of the Company. *The general transfer warehouses of the Company are all located outside the State of Indiana, namely at Chicago and Moline, Illinois, Kansas City, Council Bluffs and St. Paul (R. 48).

The International Harvester Company had in 1935 and 1936 factories in Illinois, Ohio, Tennessee, New York, Wis-

consin and Louisiana and two factories in Indiana, one at Fort Wayne, manufacturing motor trucks, and one at Richmond, manufacturing seeding machines and small tillage implements. It had more than 100 selling branches in the United States. Four of these selling branches were in Indiana, at Indianapolis, Fort Wayne, Terre Haute and Evansville, which sold to dealers and consumers in their trade areas, including parts of Indiana and parts of Ohio, Illinois and Kentucky. It had a motor truck branch in Chicago selling in the Chicago trade area, including the North half of Lake County, Indiana, and general branches at Kankakee, Illinois, Louisville, Kentucky, and Cincinnati, Ohio, selling to buyers and consumers in the states where they were located and also to dealers and consumers located in certain parts of Indiana (R. 47-54).

The branch house areas have been established for many years and long before the Indiana Gross Income Tax was enacted in 1933. The branch houses at Fort Wayne, Indianapolis, Terre Haute, Evansville and Cincinnati have been located at the above places since November 1, 1902. The branch house at Kankakee has been located there since November 1, 1903. The Louisville branch house was originally located there on November 1, 1902, but it was moved across the Ohio River to New Albany, Indiana, on October 12, 1911, and then back to Louisville on December 1, 1922, where it has since remained. The Chicago Motor Truck Branch was established January 1, 1917 (R. 55-56).

The branch house at Cincinnati for many years has served a trade area consisting of territory in southwestern Ohio, northeastern Kentucky and southeastern Indiana. The branch at Kankakee has handled a trade area consisting of territory along both sides of the state line, in Illinois and Indiana. The branch at Fort Wayne has handled a trade area consisting of territory in northeastern Indiana

and in Ohio along the Indiana-Ohio border. The branch at Evansville has handled territory in the tri-state trade area in nearby Kentucky, Illinois and Indiana. The branch at Louisville has served the trade area in nearby Indiana and Kentucky (R. 48-50).

Evidence was introduced showing that other wholesale businesses operating in Indiana, Ohio, Kentucky and Illinois have trade areas overlapping state lines; that Louisville is the commercial center of a trade area extending into Indiana and Kentucky; that Cincinnati is the center of a trade area extending into Ohio, Kentucky and Indiana; that Evansville is the center of a trade area including parts of Indiana, Kentucky and Illinois; that Terre Haute is the center of a trade area including parts of Indiana and Illinois; Fort Wayne is the center of a trade area including parts of northeastern Indiana and Western Ohio, and that northwestern Indiana is in a trade area including part of northeastern Illinois (R. 110-114).

The Complaint as filed sought recovery of taxes paid on six classes of sales designated as Classes A, B, C, D, E and F, but in the course of the litigation the Department of Treasury conceded the nontaxability of gross receipts from the shipments in carload lots in Classes A (R. 71) and E (R. 76) and conceded all of Class B (R. 72-73). The International Harvester Company conceded the taxability of sales in Class F (R. 78).

The trial court by its judgment entered April 29, 1942, held that the Appellants were not entitled to recover any of the taxes paid on the remaining sales in Class E, but that Appellants were entitled to recover taxes on receipts from sales in Classes A, C and D, and it rendered judgment accordingly (R. 32-34).¹

¹ The copy of the judgment of the trial court reproduced in the Record (pp. 31-35) erroneously states as the finding of the trial court that Appellants should recover the tax paid on receipts from "retail sales in Classes

The Supreme Court of Indiana affirmed the judgment of the trial court in Appellants' favor as to Class A, affirmed the trial court's judgment against Appellants as to Class E, reversed the trial court's judgment in Appellants' favor as to Classes C and D, and directed the trial court to render judgment as indicated by the Supreme Court opinion. The Court's opinion stated that the transactions in Classes C, D and E were subject to the Indiana Gross Income Tax because "Neither of these classes present a possibility of double taxation, since no other state could impose such a burden in view of the conclusions reached in the J. D. Adams case."

Therefore, the three classes involved in this appeal are as follows:

Class C. Sales by branches located outside of Indiana, namely at Kankakee, Louisville and Cincinnati, and Chicago Motor Truck Branch, to dealers and consumers residing in Indiana, who went to the factory in Indiana, and there took delivery and possession of the purchased goods and transported the goods to their places of business or residence in Indiana. The goods were principally motor trucks manufactured at the Fort Wayne works and a small amount of seeding machines and tillage implements manufactured by the Richmond works (R. 73).

Class D. Sales by branches located in Indiana, namely at Evansville, Fort Wayne and Terre Haute, to dealers and consumers residing outside Indiana, who came to Indiana and took delivery of the purchased goods in Indiana and transported the goods back to their places of business or residence in Kentucky, Illinois or Ohio (R. 74).

A, C and D". The word "retail" did not so appear in the trial court's judgment. This error in the Record is inconsequential, however, because it elsewhere repeatedly appears in the Record that tax on both wholesale and retail sales was involved as to both of the now remaining Classes C and D, e. g. see Stipulation of Facts filed with the trial court, Record, pp. 73-75.

Class E. Sales by branches in Indiana to dealers and consumers in Indiana of goods shipped by Appellant from outside the State of Indiana to buyers in the State of Indiana pursuant to orders or contracts of sale specifying that shipment would be so made. The goods in Class E were manufactured outside Indiana (R. 75-76). There was evidence showing that the shipments were so made either because the branch house in Indiana did not have the article in stock or because the freight rate direct from the factory or transfer house to the buyer in Indiana would be less than the combined freight rate originally from the factory or transfer house to the branch and then from the branch to the buyer (R. 146-147, 128-134).

The Federal Questions Involved Are Substantial.

The questions directly involved in this appeal are whether the Indiana Gross Income Tax on gross receipts of International Harvester in said Classes C, D and E are constitutional under the Commerce Clause of the United States Constitution and under the Due Process Clause of the Fourteenth Amendment.

In the case of *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, the United States Supreme Court held that the Indiana Gross Income Tax could not be levied on gross receipts of the J. D. Adams Mfg. Co., the seller located in Indiana, from sales to buyers in other states or foreign countries, and condemned the Indiana Gross Income Tax as applied to sales in interstate commerce, saying:

“The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manu-

factured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by article 1, section 8, of the Constitution." 304 U. S. 307, 311.

Then in the case of *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, the United States Supreme Court upheld the New York City Sales Tax on sales by the Berwind-White Coal Mining Co. to purchasers in New York City. The Court distinguished the *Berwind-White* case from the *Adams* case, saying "The rationale of the *Adams Mfg. Co.* case does not call for condemnation of the present tax. Here the tax is conditioned upon a local activity delivery of goods within the State upon their purchase for consumption." The Indiana tax is not so conditioned and by the rationale of the *Adams* case cannot be imposed on sales in Classes C, D and E.

On the same day the United States Supreme Court decided the cases of *McGoldrick v. Felt & Tarrant Mfg. Co.* and *McGoldrick v. A. H. DuGrenier, Inc.*, 309 U. S. 70, stating that the decision in both said cases is controlled "by our decision in the *Berwind-White* case."

The Court said that the New York City Sales Tax in both cases "was imposed on all the sales of merchandise for which orders were taken within the city and possession of which was transferred to the purchaser there."

This was the same tax upheld in the *Berwind-White* case as conditioned upon a local activity and expressly distinguished there from the Indiana Gross Income Tax.

In *Allied Mills, Inc., v. Department of Treasury*, 87 L. Ed. 514, 63 S. Ct. 666, the United States Supreme Court in a *per curiam* opinion affirmed the judgment of the Supreme Court of Indiana citing the above case of *McGoldrick v. Felt*

& Tarrant Mfg. Co., 309 U. S. 70, and also the case of *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62, which was a case under the California Use Tax.

The case of *Allied Mills, Inc.*, was the reverse of the *Adams* case. In the *Allied Mills* case the sales of livestock feeds were made by Allied Mills, an Indiana corporation, to buyers in Indiana on contracts approved by factory branches of Allied Mills in Illinois and the feeds were shipped from those factory branches to the buyers in Indiana.

The Supreme Court of Indiana in this case, *Department of Treasury, et al. vs. International Harvester Company, et al.*, affirmed the tax on the Appellants herein on Classes C, D and E on the authority of the above case of *Allied Mills, Inc. v. Department of Treasury, supra*, stating that when the *Allied Mills* case (42 N. E. (2d) 34) was before the Supreme Court of Indiana, "we interpreted the *Adams* case as meaning that the tax may be levied by the buyer's state regardless of the incidental interstate nature of the transaction." This view was sustained by the Supreme Court. *Allied Mills, Inc. v. Department of Treasury.*"

The Supreme Court of Indiana therefore interprets the *per curiam* opinion of the United States Supreme Court in the *Allied Mills* case as meaning that the state of the buyer may levy the Indiana Gross Income Tax on receipts on sales by the seller in another state, although the *ratio decidendi* of the decision in the *Adams* case denied the right of the state of the seller to levy the Indiana Gross Income Tax on gross receipts from interstate commerce transactions, and the rationale of that decision denied the right of any state to levy a tax of that character on receipts from interstate sales.

The state court's conclusion is that the state of the buyer may lay such a tax and the inference is that only the state of the buyer may tax. We submit that both the con-

clusion that the state of the buyer may tax and the inference that it is the only state that may tax, are unauthorized by the decisions of the United States Supreme Court. —

It is obvious that this theory is squarely opposed to the rule laid down in the *Adams* case which was re-affirmed by the Court in *McGoldrick v. Berwind-White Coal Mining Co.*, *supra*. The principle was stated again in *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 435, where the Court adverted to the maxim that "even interstate business must pay its way" but said that it was enough for the purposes of that case that "in the absence of Congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state". Such a tax, the Court said, "at least when not apportioned to the activities carried on within the State" burdens the commerce "in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce, and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject" (pp. 438-9).

Therefore we do not understand that the *Adams* case means in the words of the Supreme Court of Indiana, "that the tax may be levied by the buyer's state regardless of the incidental interstate nature of the transaction". We understand rather that the United States Supreme Court held in the *Adams* case and in the *Gwin, White & Prince* case that because the transaction was such that if the state of the seller could tax then the state of the buyer, the state of manufacture, the state of approval of the contract and receipt of the sale proceeds and other states which the commerce touches could also tax the entire proceeds with-

out apportionment, and therefore that there was consequently a danger of multiple taxation and no state could tax the entire gross receipts from such a transaction.

The cases cited by the United States Supreme Court in its *per curiam* opinion in *Allied Mills, Inc. v. Department of Treasury*, *supra*, namely, *McGoldrick v. Felt & Tarrant Mfg. Co.*, 309 U. S. 70 and *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62, do not apply in this case.

McGoldrick v. Felt & Tarrant Mfg. Co., *supra*, was a tax under the New York City Sales Tax, but that tax was laid on the buyer, was conditioned on local activity and is entirely different from the Indiana Gross Income Tax. The taxable event under the New York City tax could occur only once and only in one jurisdiction. The Indiana tax on the other hand is a tax not on the buyer but on the seller on gross receipts from all sources, on gross receipts from dividends, rent, interest, salaries, wages, profits of all kinds and includes receipts not only from retail sales, where the sale is to the buyer for consumption, but also gross receipts from wholesale sales where the goods do not come to rest in the hands of the consumer, but are to be resold by the dealer and where there is a manifest possibility of multiple taxation. Every state which the interstate sale touches and which has a valid basis under the due process clause for asserting that gross receipts from the sale have a source, even in part, with the state may, except for the commerce clause, impose and repeatedly impose a gross receipts tax on the interstate sale. That is the "vice" of the Indiana tax which the commerce clause condemns, but which is not present in the New York City tax.

Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62, was a tax under the California Use Tax, a tax on the consumer.

THE FEDERAL QUESTIONS IN CLASS C SALES ARE SUBSTANTIAL.

The point was raised below in this case that there was no transportation across state lines in Class C transactions. The goods were at a factory in Indiana and were picked up there by the buyer in Indiana. The branch which made the sale was in Ohio, Kentucky or Illinois. The branch outside of Indiana accepted the order and directed the factory to deliver the goods to the buyer when he called for them. The branch outside of Indiana received the entire sales proceeds.

In Class C sales it is submitted that the interstate transaction is unbroken from the time a contract is made by a sales branch at Cincinnati, Louisville or Kankakee with a buyer in Indiana until the motor truck or seeding machine reaches the buyer's home town in Indiana. The transaction which started with a contract made in Ohio, Kentucky or Illinois is not completed until the goods come to rest at the buyer's home town in Indiana.

From the day of *Gibbons v. Ogden*, 9 Wheaton 1, it has been recognized, in the words of Chief Justice Marshall, that commerce is "undoubtedly traffic but it is something more, it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches and is regulated by prescribing rules for carrying on that intercourse."

It has been held that the transmission of telegrams, of telephone messages, of radio messages are transactions in interstate commerce.

Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1;

Fishers Blend Station, Inc. v. State Tax Com. 297 U. S. 650;

Newfield v. Ryan, 91 Fed. (2d) 700, Certiorari denied 302 U. S. 729, Rehearing denied 302 U. S. 777;

Cooney v. Mountain States Telephone & Telegraph Co.,
294 U. S. 284.

In Class C there is every interstate feature present except that to save transportation charges on shipment from the out-of-state branch, the buyer obtained the goods at the factory in Indiana and there is no actual shipment across a state line. Under the decisions last cited the transaction is nevertheless an interstate sale of goods.

In Class C then there is an interstate sale between the seller outside Indiana to the buyer inside Indiana. Whereas in the *Adams* case the seller's state sought to levy the tax, here Indiana is the buyer's state and seeks to lay the tax. The Court said in the *Adams* case that the seller's state could not tax because to permit it to lay a tax of the character of the Indiana Gross Income Tax, would also require that the buyer's state could lay such a tax. The rationale of the *Adams* case was that neither the seller's state nor the buyer's state could levy a tax of the character of the Indiana Gross Income Tax. Therefore, there is the question under the Commerce Clause whether the state of the buyer may levy the Indiana Gross Income Tax on the sales in Class C. Further, under the Due Process Clause of the Fourteenth Amendment, there is the question whether the entire proceeds of the sales in Class C may be taxed by Indiana, the buyer's state. In the Class C sales the seller is outside of Indiana, the contract of sale is approved and accepted outside of Indiana, so that the contract is made outside of Indiana, and the seller receives the price of the goods sold outside of Indiana. The proceeds of sales in Class C are therefore in material part derived from sources outside of Indiana, yet Indiana seeks to tax the entire proceeds of Class C sales and does not limit the tax to that part of the proceeds derived from Indiana sources. The statute makes no provision for an apportionment of any

kind or upon any basis, and the taxpayer is therefore given no opportunity to make any apportionment and to pay tax only upon that part of the proceeds of Class C sales which are derived from Indiana sources. This violation of the Due Process Clause of the Fourteenth Amendment also presents a substantial Federal question.

THE FEDERAL QUESTIONS IN CLASS D SALES ARE SUBSTANTIAL.

The Supreme Court of Indiana interpreted the United States Supreme Court's opinion in the *Allied Mills* case as holding that the state of the buyer can tax. But the state of the buyer in Class D is not Indiana. In Class D the buyer is in Ohio, Kentucky or Illinois and comes to Indiana to get his truck or farm implement at an office of the International Harvester Company in Indiana, gets delivery in Indiana, and takes the goods back to his place of business or home in Ohio, Kentucky or Illinois. Indiana is not the buyer's state but is the state where delivery was made.

Consequently, if the state of the buyer can tax, namely, Ohio, Kentucky or Illinois, and if the state of delivery, Indiana, can also tax, as held in this case by the Supreme Court of Indiana, then there is definitely the possibility of double taxation which is exactly what the Court said in the *Adams* case would render the tax an invalid burden on interstate commerce.

The possibility of multiple taxation as applied to a gross receipts tax on interstate sales is strikingly presented by the case of these drive-away deliveries, namely, where the buyer takes delivery in one state and transports the article himself to his own home or place of business in his own state. Thus, in *Commissioner of Corporations & Taxation v. Ford Motor Company*, 308 Mass. 558, 33 N. E. (2d) 318, Ford Motor Company delivered automobiles to its out of state dealers who drove them to their "respective districts all of which were beyond the boundaries of this common-

wealth." The Court held that these sales were sales in interstate commerce and could not be included in the measure of the Massachusetts excise tax.

It is clear that the New York City Sales Tax cases have no bearing on the tax in Class D sales. In the *New York City* cases the place of delivery and the location of the buyer were both in New York City, but in the case of drive-away deliveries the delivery is made in one state and the buyer is located in a second state and it is possible that the seller's office where the proceeds of the sale are received may be in a third state. Which of these states and how many of them shall be permitted to lay a gross receipts tax on the one transaction?

It is also obvious that the case of *Allied Mills, Inc. v. Department of Treasury, supra*, has no bearing on the tax on Class D sales. The tax in the *Allied Mills* case was levied by the state of the buyer. In Class D the tax is levied by the state of delivery and the state of the buyer is in Ohio, Kentucky or Illinois.

Moreover, as respects sales to Ohio users included in Class D, Ohio now has in effect a Use Tax levied "On the storage, use, or other consumption in this state of tangible personal property purchased on or after the first day of January, 1936, for storage, use, or other consumption in this state," with certain exceptions, among which is property on the sale of which the Ohio Sales Tax has been paid. General Code of Ohio, Section 5546-26.

In the case of *Henneford v. Silas Mason Co.*, 300 U. S. 577, Mr. Justice Cardozo said, on page 587, that if there were limits to the power of the state as a self-contained unit to "frame its own system of burdens and exemptions without heeding systems elsewhere" there is "no need to mark them now. It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay

again in the state of destination. This statute by its framework avoids that possibility."

The Supreme Court of Indiana has sustained a tax by Indiana, the state of delivery on the sale at retail in Class D to an Ohio buyer, and the Ohio use tax levies a tax on the use in Ohio of an article bought in Indiana and brought into Ohio by the Ohio buyer.

Therefore as to Class D sales we submit that the question is substantial first because the court bases its decision on the ground that the state of the buyer can lay a gross receipts tax on proceeds from an interstate transaction whereas the state of Indiana as to Class D is not the state of the buyer but the state of delivery. Secondly, if both the state of the buyer and the state of delivery can tax there is manifestly double taxation. Possibility of double and even multiple taxation in such cases as Class D sales is wide open. Thirdly, the Ohio Use Tax is levied on the use of an article purchased at retail in Indiana in Class D and yet the Supreme Court of Indiana has held that the Indiana Gross Income Tax may be levied on gross receipts from retail sales in Class D.

In Class D sales therefore the seller is in Indiana and the buyer is outside Indiana, the same as in the *Adams* case, except that here the buyer comes to Indiana, receives the goods and provides the transportation of the goods from Indiana to the buyer's place of business or residence outside Indiana. It would appear utterly immaterial, of course, whether the seller, or the buyer or an independent carrier performs the transportation; the interstate character of the transaction remains the same. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282. There is therefore the substantial Federal question whether the tax on Class D sales is invalidated by the decision in the *Adams* case. If the tax is not thus prohibited, and if it is true that the Court has approved the alleged validity of a gross receipts

tax imposed by the buyer's state, then there is the further substantial Federal question whether the buyer's state is the state where the buyer maintains his place of business or residence and where the economic competition in the market place occurs, or is the state where the buyer takes delivery of the goods. That a substantial Federal question is present in Class D sales is most clearly shown by the conflict of decisions in the state courts. Massachusetts and California have denied the validity of a tax on the proceeds of Class D sales. *Commissioner vs. Ford Motor Co.*, 308 Mass. 558, 33 N. E. (2d) 318; *Standard Oil Co. vs. Johnson*, 33 Cal. App. (2d) 430, 92 Pacific (2d) 470. The Indiana Supreme Court in the instant case has upheld the validity of the tax on Class D sales. Further, there is a substantial Federal question under the Due Process Clause of the Fourteenth Amendment in that the taxing Act permits no apportionment of taxable gross receipts between that part of the receipts having a source in Indiana and that part having a source outside Indiana. In Class D sales the buyer from whom the purchase price emanates is outside Indiana and is in large part the source of the purchase price. Moreover, the tax is on the privilege of receiving gross income and as respects a buyer in another state, that right may be effectively exercised and legally enforced only in the buyer's state outside Indiana. Under the Due Process Clause, can Indiana constitutionally tax the exercise of a privilege which is effectively granted and can be legally enforced only in another state?

THE FEDERAL QUESTIONS IN CLASS E SALES ARE SUBSTANTIAL.

In Class E sales the seller and buyer are both in Indiana, but the goods are obtained outside Indiana and are shipped interstate to the buyer in Indiana pursuant to a contract requiring such shipment. In *Sonneborn Bros. vs. Cureton*, 262 U. S. 506, the Court held that this kind of transaction

was interstate and under the Commerce Clause could not be taxed. The proceeds of Class E sales are therefore exempt from the Indiana tax unless the *Sonneborn* case has been overruled, but the Court has not overruled the *Sonneborn* case. There is therefore the substantial Federal question whether the tax on the proceeds of Class E sales is an invalid burden under the Commerce Clause. Further, the goods sold in Class E were manufactured outside Indiana, and in large part the proceeds of sale were derived from the place of manufacture outside Indiana. However, the Indiana Act, as construed by the Indiana Supreme Court, lays a tax on the full proceeds of sale, without apportionment to that part of the proceeds having an Indiana source, and the Act permits no such apportionment of the proceeds of sale. Therefore, there is the further substantial Federal question whether the tax on Class E violates the Due Process Clause of the Fourteenth Amendment.

The Manner in Which the Federal Questions Were Raised.

The Federal questions involved in this case were raised by the Appellants in their Complaint in the Marion Superior Court and on their appeal to the Supreme Court of Indiana. In their Complaint Appellants herein alleged that the taxes on the transactions described in Classes A, B, C, D, E and F were taxes on gross receipts derived from business conducted in commerce between the states, and that if the Gross Income Tax Act were construed to impose a tax on gross receipts of the Plaintiffs "derived from their business conducted as described in Classes A, B, C, D, E and F, then said Act is invalid and void for the reason that such tax constitutes a regulation of, and a burden upon, interstate commerce and is in violation of Section 8, Article 1, of the Constitution of the United States" (R. pp. 24-25).

Appellants also alleged in the Complaint that if the Gross Income Tax Act, considered according to its true

intent, imposes a tax on gross receipts of the Plaintiffs derived from sources from their business as described in Classes A, B, C, D, E and F, "then said Act is invalid and void for the reason that the State of Indiana has no jurisdiction to impose a tax upon such gross receipts, and the levy of such tax is lacking in due process of law and is in violation of the Fourteenth Amendment of the Constitution of the United States" (R. p. 25). The Complaint also contended that the taxes in Classes A, B, C, D, E and F were levied on the entire gross receipts from such sales, and that the State of Indiana did not segregate or seek to limit the tax to the activities carried on within the State, and that if said Gross Income Tax Act when construed according to its true intent "imposes a tax upon said entire gross receipts, derived from the business conducted as described in Classes A, B, C, D, E and F, then said Act is invalid and void for the reason that the State of Indiana has no jurisdiction to impose a tax upon such gross receipts, and the levy of such tax is lacking in due process of law and is in violation of the Fourteenth Amendment of the Constitution of the United States" (R. pp. 25-26).

The trial court held for Appellants, that the receipts from sales in Classes A, C and D were not subject to the Indiana Gross Income Tax, and against Appellants, that the receipts in Class E from sales filled by shipments in less than carload lots were subject to the Indiana Gross Income Tax (R. pp. 31-35).

While the trial court rendered no opinion and stated no special findings of fact or conclusions of law, its decision necessarily held either (1) that the receipts from sales in Classes C and D were in interstate commerce, and that a tax on them was an invalid burden on the commerce, or (2) that the tax on Classes C and D was lacking in due process of law and was void under the Fourteenth Amendment; and also necessarily held that the tax on sales in Class E was

neither a burden on interstate commerce nor lacking in due process of law.

In the Appellants' brief in the Indiana Supreme Court (there designated Appellees' Brief), the same constitutional questions were raised as to the tax on Classes C, D and E.

Proposition II of said brief was as follows:

"A tax on Class C sales would be a burden on transactions in interstate commerce forbidden by the Commerce Clause" (R. p. 165).

Proposition III of said brief was as follows:

"A tax on Class D sales would be a burden on transactions in interstate commerce forbidden by the Commerce Clause" (R. p. 165).

Proposition IV of said brief was as follows:

"Class E sales are sales in interstate commerce and to levy a gross income tax on gross receipts therefrom would be to cast an unconstitutional burden on interstate commerce" (R. p. 165).

Proposition V of said brief was as follows:

"A tax on Appellees' gross receipts from sales in Classes A, C, D or E would be a tax on property and business located outside the State of Indiana and would be in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States" (R. p. 165).

The Supreme Court of Indiana held that applying to this case its decision and the decision of this Court in the *Allied Mills* case, "it seems clear that transactions under Classes C, D and E are subject to our Gross Income Tax. Neither of these classes present a possibility of double taxation, since no other State could impose such a burden in view of the conclusions reached in the *J. D. Adams* case."

Cases Believed to Sustain Jurisdiction.

Appellants believe that the following cases sustain the jurisdiction of this Court.

J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307;
Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 304;
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282;
Fisher's Blend Station v. Tax Commission, 297 U. S. 650;
Hans Rees Sons v. North Carolina, 283 U. S. 123.

Dated this 9th day of August, 1943.

Respectfully submitted,

JOSEPH J. DANIELS,

EDWARD R. LEWIS,

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*Attorneys for Appellants, International
Harvester Company and International
Harvester Company of America.*

APPENDIX A.

IN THE SUPREME COURT OF THE STATE OF INDIANA, NOVEMBER TERM, 1942.

On the 19th day of March, 1943, being the — Judicial day of said November Term, 1942.

No. 27,767

Hon. Frank N. Richman, Chief Justice; Hon. H. Nathan Swaim, Hon. Michael L. Fansler, Hon. Curtis G. Shake, Hon. Mart J. O'Malley, Associate Judges.

In the Case of DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON and FRANK G. THOMPSON, as and Constituting the Department of Treasury of the State of Indiana,

VS.

INTERNATIONAL HARVESTER COMPANY and INTERNATIONAL HARVESTER COMPANY OF AMERICA.

APPEALED FROM THE MARION SUPERIOR COURT, ROOM THREE.

Come the parties by their attorneys, and the court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by SHAKE, J.

The appellees sued to recover Gross Income Taxes paid to the State of Indiana during the years 1935 and 1936. It was stipulated at the trial that judgment for any amount found due should be in favor of the appellee, International Harvester Company, and that, for the purposes of the case, the appellee should be considered as one party.

The evidence disclosed, without conflict, that the appellees were corporations organized under the laws of other States but authorized to do business in Indiana. They were engaged in the manufacture of farm implements and in the sale of their products both at wholesale and retail. Manufacturing establishments were maintained at Richmond

and Fort Wayne, and selling branches at Indianapolis, Terre Haute, Fort Wayne, and Evansville in this State. There were also numerous manufacturing plants and sales branches in adjoining States and elsewhere. Each branch served assigned territory and in several instances parts of Indiana were within the exclusive jurisdiction of branch offices located without the State.

The trial court determined the tax liability of the appellees under four factual situations, designated as Classes A, C, D and E. The nature of these transactions may be stated as follows:

Class A: Sales by branches located outside Indiana to dealers and users located in Indiana. These sales were made on orders solicited in Indiana by representatives of out-of-state branches, or upon mail orders sent from Indiana to out-of-state branches. The orders were accepted by the outside State branch offices and the purchase money paid to them. Without directions from the purchasers, the goods were shipped to them in Indiana from branches, warehouses, or factories located outside Indiana.

Class C: Sales by branches located outside Indiana to dealers and users residing in Indiana. The orders were solicited in Indiana and the customers took delivery to themselves at the factories in Indiana to save time and expense of shipping.

Class D: Sales by branches located in Indiana to dealers and users residing outside of Indiana, in which the customers came to Indiana and accepted delivery to themselves in this State.

Class E: Sales by branches located in Indiana to dealers and users residing in Indiana, in which the goods were shipped from points outside Indiana to customers in Indiana, pursuant to contracts so providing.

The court below found that the appellees were entitled to a refund of taxes paid upon A, C, and D transactions, but not for those under Class E. By properly assigned errors and cross-errors each of these findings is challenged.

Much of the briefs were devoted to the subject of the interstate attributes of the transactions. We consider these discussions beside the issues. Interstate commerce is not

to be exempted from this tax unless it is imposed in such a manner as to lead to the possibility of double or multiple burdens. The Supreme Court of the United States held in *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307, 82 L. Ed. 1365, 58 S. Ct. 913, 117 A. L. R. 429, that this tax could not be imposed upon a domestic corporation with its principal office and place of business in this State, for gross income derived from the sale of its products to customers in other States. The Court said that, "the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold, as well as those in which they are manufactured. Interstate commerce could thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids." In *Department of Treasury v. Allied Mills, Inc.* (1942), Ind., 42 N. E. (2d) 34, we interpreted the *Adams* case as meaning that the tax may be levied by the buyer's State regardless of the incidental interstate nature of the transaction. This view was sustained by the Supreme Court. *Allied Mills, Inc. v. Department of Treasury* (1943), — U. S. —, —, L. Ed. —, — S Ct. —.

Applying the above decisions to the case at bar, it seems clear that transactions under Classes C, D, and E are subject to our Gross Income Tax. Neither of these classes present a possibility of double taxation, since no other State could impose such a burden in view of the conclusions reached in the *J. D. Adams* case.

Class A presents a different problem. Section 2 of Ch. 50, Acts 1933, §64-2602, Burns' 1933, §15982, Baldwin's 1934, which was in force during 1935 and 1936, provided:

"Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this State, or who derived gross income from sources within this state,
 • • •"

It was beyond the power of the treasury department to broaden the tax base established by this statute by administrative regulations. In *Department of Treasury v. Mueßel* (1941), 218 Ind. 250, 254, 32 N. E. (2d) 596, this Court said:

"Unless the transaction comes clearly within one of the provisions of this definition it cannot be taxed as gross income. It is a settled rule of statutory construction that statutes levying taxes are not to be extended by implications beyond the clear import of the language used, in order to enlarge their operation, so as to embrace transactions not specifically pointed out. In case of doubt such statutes are to be construed more strongly against the State and in favor of the citizen."

The appellants would have us construe the statute as exempting only income derived *entirely from activities* outside of Indiana. This would distort the clear import of the language employed and violate the rule stated above. Under Class A the orders upon which the goods were sold were accepted outside the confines of Indiana, and payment was made to branches in other States. There was no showing of a tax evasion. We cannot say that income so received by the appellees was "derived from sources within the State of Indiana." Perhaps we should call attention to the fact that §2 of the Gross Income Tax of 1933 has since been amended. Acts 1937, Ch. 117, §2, p. 604, §64-2602, Burns 1933 (Supp.), §15982, Baldwin's Supp. 1937.

The judgment is affirmed as to Class A and E transactions, and reversed as to Classes C and D. The Superior Court of Marion County, Room 3, will sustain the appellants' motion for a new trial and enter a judgment as indicated by this opinion. The costs are adjudged equally against the parties.

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CHARLES ELMORE CROPLEY
CLERK

No. **355**

**IN THE
SUPREME COURT OF THE UNITED STATES**

**INTERNATIONAL HARVESTER COMPANY and
INTERNATIONAL HARVESTER COMPANY
OF AMERICA, Appellants,**

vs.

**DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. Clifford Townsend, Joseph M. Robertson
and Frank G. Thompson, as members of and constituting
the Board of Department of Treasury,**

Appellees.

**ON APPEAL FROM THE SUPREME COURT OF THE STATE
OF INDIANA**

**BRIEF OF APPELLANTS OPPOSING APPELLEES'
MOTION TO DISMISS APPEAL OR AFFIRM
DECISION OF STATE COURT.**

**JOSEPH J. DANIELS,
EDWARD R. LEWIS,
PAUL N. ROWE,**

Attorneys for Appellants.

TABLE OF CONTENTS

	Page
I. The proper remedy is appeal and not certiorari..	2- 4
II. The record presents for decision substantial federal questions which have not been ruled on by this Court.....	4-20
Class D sales	4-13
Class C sales	13-17
Class E sales	17-19

TABLE OF CASES

	Page
Adams Mfg. Co. v. Storen, 304 U. S. 307.....	5, 12, 17
Allied Mills, Inc. v. Department of Treasury, 87 L. Ed. 514, 63 S. Ct. 666.....	5, 6, 17, 18
Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232.....	4
Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226.....	4
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282	2
Department of Treasury v. Wood Preserving Corp., 313 U. S. 62.....	5, 6, 8, 9, 10
Gwin, White & Prince v. Henneford, 305 U. S. 435....	12
McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33.....	5, 12, 17
Nashville, C. & St. L. R. Co. v. Walters, 294 U. S. 405	3
Nelson v. Sears, Roebuck & Co., 312 U. S. 359.....	14
Sonneborn Bros. v. Cureton, 262 U. S. 506.....	19
Superior Oil Co. v. Mississippi, 280 U. S. 390.....	9
Wiloil Co. v. Pennsylvania, 294 U. S. 169.....	19

STATUTES CITED

Judicial Code, Sec. 237(a), 28 U. S. C. 344a.....	2
Illinois Laws 1943, S. B. 512.....	11

IN THE
SUPREME COURT OF THE UNITED STATES

INTERNATIONAL HARVESTER COMPANY and
INTERNATIONAL HARVESTER COMPANY OF
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Appellants,

vs.

DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. Clifford Townsend, Joseph
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as members of and constituting the
Board of Department of Treasury,

Appellees.

No. _____

ON APPEAL FROM THE SUPREME COURT OF THE STATE
OF INDIANA

**BRIEF OF APPELLANTS OPPOSING APPELLEES'
MOTION TO DISMISS APPEAL OR AFFIRM
DECISION OF STATE COURT.**

Appellees have filed their Statement of Matters and
Grounds Making Against the Jurisdiction of This Court
and with that Statement have also filed their motion to dis-
miss appellants' appeal in the above entitled cause or to
affirm the decision of the Supreme Court of Indiana therein.

Pursuant to Rule 12, Paragraph 3, of the Rules of the Supreme Court of the United States and to Rule 7, Paragraph 3, appellants file this brief opposing said motion.

I

THE PROPER REMEDY IS APPEAL AND NOT CERTIORARI

Appellees, in their brief in support of their motion, state on page 2 that section 237(a) of the Judicial Code (28 U. S. C. 344a) grants the right of appeal only where there is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States, and that since "the applicability and not the validity of the Indiana Statute is involved," the application of appellants to this court should be considered, if at all, as an application for a writ of certiorari and not an application for appeal.

But it has been conclusively held by the United States Supreme Court that where the appellant contends that a statute as applied is unconstitutional under the Federal Constitution and the decision of the State Supreme Court has been in favor of the validity of the statute as so applied, the remedy is appeal and not certiorari.

The case of *Danke-Walker Co. v. Bondurant*, 257 U. S. 282, was brought on writ of error to review a judgment of the Court of Appeals of Kentucky. The court said, Mr. Justice Van Devanter writing the opinion, that a statute "may be invalid as applied to one state of facts and yet valid as applied to another." The opinion proceeds to say that the provisions quoted from the Judicial Code "show that in cases where the validity of a state statute is drawn in ques-

tion because of alleged repugnance to the Constitution, the mode of review depends upon the way in which the state court resolves the question. If it be resolved in favor of the validity of the statute, the review may be on writ of error; and if it be resolved against the validity, the review can only be on writ of certiorari." Since then, of course, the remedy by appeal has been substituted for remedy by writ of error.

In *Nashville, C. & St. L. R. Co. v. Walters*, 294 U. S. 405, the appellant took an appeal to the United States Supreme Court from a decree of the Supreme Court of Tennessee, which affirmed an order of the State Highway Commission of Tennessee requiring the separation of grades at a railroad crossing. Here, obviously, there was no question of the validity of the Tennessee statute if properly applied. The sole question was its constitutionality as applied by the State Highway Commission and sanctioned by the Supreme Court of Tennessee. Mr. Justice Brandeis, writing the opinion, said, "A statute valid as to one set of facts may not be valid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied. The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably." (Page 415.)

Now in this case the appellants have contended from the filing of the complaint in the trial court through the Indiana Supreme Court that the Indiana Gross Income Tax as applied to transactions in Classes C, D and E is a burden on interstate commerce and denies due process of law under the Fourteenth Amendment. The question of the validity of the Indiana Gross Income Tax Act under the federal Constitution was directly involved, and the Indiana Supreme Court could not have given judgment without decid-

ing such question. We submit, therefore, that the proper remedy is appeal and not certiorari.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232;
Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226.

II

THE RECORD PRESENTS FOR DECISION SUBSTANTIAL FEDERAL QUESTIONS WHICH HAVE NOT BEEN RULED UPON BY THIS COURT.

Appellants believe that their Jurisdictional Statement fully covers most of the argument advanced by appellees in their Counter Jurisdictional Statement. Appellants will limit themselves in this brief to the new matters presented in Appellees' Counter Jurisdictional Statement.

CLASS D SALES

We take up Class D sales first because Class D most strikingly presents the threat of multiple taxation on gross receipts from interstate commerce.

Class D sales are sales by an International Harvester branch house in Indiana to a buyer, either a dealer or consumer in Kentucky, Ohio or Illinois, where the goods are delivered to the buyer in Indiana and are taken by the buyer back to his home town in Kentucky, Ohio or Illinois.

The Supreme Court of Indiana has sustained the tax in Class D by Indiana, the state of *delivery* to the buyer, and it gives as a reason for its decision that the United States Supreme Court has held that the state of the *buyer* can tax gross receipts from interstate transactions. But the state of the buyer in Class D is not Indiana where deliv-

ery takes place but is Ohio, Kentucky or Illinois where the buyers reside.

Appellees now assert that the question is foreclosed by the decisions of the United States Supreme Court, citing the New York City retail sales tax cases, *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, and companion cases decided the same day; *Department of Treasury of Indiana v. Wood Preserving Corporation*, 313 U. S. 62; and *Allied Mills v. Department of Treasury*, — U. S. —, 87 L. Ed. 514, 63 S. Ct. 666.

We believe that we have sufficiently shown in our Jurisdictional Statement the distinction between the New York City retail sales tax and the Indiana gross income tax as applied to International Harvester Company in Class D. It was because of the crucial differences between the New York City tax and the Indiana tax that the United States Supreme Court said in the case of *McGoldrick v. Berwind-White Coal Mining Co.*, *supra*, that the rationale of the *Adams* case did not call for condemnation of the New York City tax. We submit, therefore, that if the tax in Class D is sustained on the authority of this Court's decision in *McGoldrick v. Berwind-White Coal Mining Co.*, then the words of this Court in that case, that the rationale of the *Adams* case did not call for condemnation of the New York City tax, are utterly meaningless.

But for another reason the tax in Class D does not depend on the decision in the New York City cases. The New York City tax was levied by the jurisdiction where the buyer lived, which was the same jurisdiction where delivery to the buyer took place.

The tax in Class D is levied by the jurisdiction where delivery to the buyer took place, but the buyer's state was

elsewhere—in Ohio, Kentucky or Illinois. The tax in Class D, therefore, raises directly the question of double taxation which the New York City tax did not raise.

Likewise, in the *Allied Mills* case the state of delivery to the buyer was Indiana and the state where the buyer lived was Indiana.

The tax in the *Allied Mills* case is therefore also vitally different from the tax in Class D where the state of delivery is Indiana and the state of the buyer is Ohio, Kentucky or Illinois.

Appellees, however, do not adopt the reason given by the Supreme Court of Indiana in this case in upholding the tax on Class D sales, that the state of the buyer can tax, but they contend that the rule is that the state "where possession of the article sold is transferred to the purchaser" is the state that can tax the gross receipts.

Appellees instance the case of a purchaser whose home is in another state going to a department store and buying an article and taking it back to his home town. Likewise, appellees cite the case of *Department of Treasury, et al. v. Wood Preserving Corporation*, 313 U. S. 62, where it was held that the delivery of railroad ties by the Wood Preserving Corporation to the Baltimore & Ohio Railroad in Indiana was an Indiana transaction so that the gross receipts from the sale of the railroad ties were subject to the Indiana gross income tax, although the railroad immediately shipped the ties to destinations in other states.

But both the department store illustration and the *Wood Preserving* case are strikingly different from the case of International Harvester Company's sales in Class D. The record shows that the branches of International

Harvester Company have been long established and that their territories overlapping state lines have likewise been long established. A dealer or a consumer in the territory of one of those branches who orders an article from the branch and then goes to the factory or to the branch and gets the article personally and takes it back to his home is in a very different position from a casual purchaser at a department store. The casual purchaser at a department store has no antecedent relationship with the store. He buys an article there and takes it to his home town and that may be the beginning and end of his relation with the store. But the dealers of the International Harvester Company operate under annual contracts covering their requirements for the year. Both dealers and consumers are located in the branch house area of the branch making the sale, and they habitually deal with that branch house, not casually or accidentally as in the case of the out of state patron of the department store. The goods bought by them from the International Harvester Company are either shipped from the company's branch house, factory, transfer house or retail outlet direct to the dealer or consumer or the dealer or consumer gets the goods personally at the factory, transfer house, branch house or retail outlet and takes them back to his home town.

There was ample evidence in the record of a material saving in delivery charges if the buyer got his article himself and transported it back from the factory or branch house to his home town.

It is true that in Class D sales the buyer would have complete control of the article in Indiana, but it is absurd to think that there was any practical possibility that he would do anything with it but take it back to his own home

town, which he did do. If the buyer were a dealer he intended to take it to his place of business. If the buyer were a user he intended to take it to his home. He had no other place of business and he had no other home.

Moreover, the record shows that 67.6% of the sales involved in this case were on conditional sales contract and it is obvious that a purchaser under a conditional sales contract cannot remove the goods from jurisdiction to jurisdiction at his own pleasure.

In the *Wood Preserving* case the Baltimore & Ohio Railroad Company, having its railroad line in Indiana and there engaged in business, bought railroad ties of the Wood Preserving Corporation. The Wood Preserving Corporation had no permanent place of business in Indiana but bought the railroad ties in Indiana from Indiana producers. The ties were inspected in Indiana by the Railroad Company. The Wood Preserving Corporation paid the Indiana producers for the ties accepted by the Railroad Company. Bills of lading were then made out with the Wood Preserving Corporation as consignor and the Railroad's Chief Engineer of Maintenance at Finney, Ohio, as consignee, and the ties were sent to Finney, Ohio, for treatment. The treating plant at Finney, Ohio, belonged to a subsidiary of the Wood Preserving Corporation. Mr. Chief Justice Hughes in writing the opinion of this Court stated, that the Wood Preserving Corporation purchased the ties from the local producers and "sold and delivered these ties in Indiana to the Railroad Company." He added that the transactions "were nonetheless intrastate transactions because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment."

In the *Wood Preserving* case the ties had only a temporary destination outside Indiana and after treatment in Ohio might in part or all be returned for use on the railroad tracks in Indiana. And, most significant, the buyer was a railroad having its tracks and doing business in Indiana; the railroad was an Indiana buyer; Indiana was both the buyer's state and the state where delivery occurred.

There was only one destination at which a dealer of the International Harvester Company had any use for the goods and there was only one destination at which a consumer buying Class D goods would have any use for the goods, namely, in each case, the home town of the dealer or consumer. In our Class D sales the goods immediately have a final and ultimate destination outside Indiana, and Indiana is not the buyer's state, but only the state of delivery.

Likewise, in the case of *Superior Oil Co. v. Mississippi*, 280 U. S. 390, Mississippi was both the buyer's state and the state where delivery occurred and, as Mr. Justice Holmes said, the subsequent interstate shipment was accidental and in no way concerned the seller, which is not true in our Class D sales.

Therefore, in all of the cases relied on by appellees, in which a tax was upheld, the taxing state was both the buyer's state and the state where delivery was made. Appellees have cited no decision of this Court in which the state where delivery alone occurs has been permitted to lay a tax on an interstate sale of goods.

In short, the argument that the state of delivery to the buyer can tax the gross receipts of Class D sales

presents the crucial issue of this appeal, which is whether both the state of delivery to the buyer and also the state where the buyer lives can tax without apportionment the same gross receipts. This question did not arise in the *Wood Preserving* case but it does definitely arise in the case of Class D sales.

In appellants' Jurisdictional Statement reference is made to the Ohio use tax which provides that if an Ohio resident goes to another state and buys an article and brings it into Ohio he is subject to the Ohio use tax.

Appellees in their Counter Jurisdictional Statement on page 10 refer to one of the stipulations in this case which is:

"(j) The gross receipts involved in this suit for a refund were not taxed and were not used as a measure of any tax assessed in any other jurisdiction than the State of Indiana and no tax has been paid by the plaintiffs to any taxing jurisdiction other than the State of Indiana upon these identical gross receipts or which was measured by them."

The paragraph above quoted might have been more complete but we submit that read as a whole it refers to taxes paid by appellants, as obviously the payment of taxes by the buyer in other states would not be within the knowledge of either appellants or appellees. The stipulation therefore does not preclude the possibility of the imposition of a use tax in the buyer's state on the use of goods purchased in Indiana.

It is clear that the Ohio use tax definitely asserts the intention of Ohio to tax the use of an article in Ohio the delivery of which was obtained by the buyer in Indiana.

Moreover, if the rule laid down by the Supreme Court of Indiana is sustained, that the buyer's state can tax gross receipts from an interstate sale, the state in which the buyer lives may assert the right not merely to lay a use tax on the buyer but also the right to tax the seller on the gross receipts from the sale.

Indeed, it is apparent that the opportunity to the buyer's state to tax the seller on gross receipts from such sales as Class D sales is too tempting to be resisted, as is demonstrated by the attempt to that end now being made by the State of Illinois.

Since our Jurisdictional Statement in this appeal was filed there has come to our notice a recent amendment of the Illinois Retailers Occupation Tax enacted by the Illinois Legislature in 1943, effective July 1, 1943 (S. B. 512, Illinois Laws 1943). This amendment added Section 1(b) to the Illinois Retailers Occupation Tax, which provides that a "person" is engaged in the business of selling tangible personal property at retail in Illinois, "whenever such 'person', either himself or through an employe or employees located in" Illinois or coming into Illinois for the purpose, "engages habitually, for livelihood or gain, in selling activity" in Illinois, "the primary purpose of which selling activity is to promote the 'sale at retail' of tangible personal property by such 'person', as the phrase 'sale at retail' is defined in this Act", and that such person is subject to the Illinois retail sales tax, notwithstanding that the orders for the sale of such property are accepted outside of Illinois, and notwithstanding that the tangible personal property which is sold as the result "of such selling activities in this state is not at the time of the sale located in this state, and notwithstanding the fact that the ownership of or title to

such tangible personal property is not transferred in this state to the purchaser."

In other words, the State of Illinois says that if an out of state dealer sends an employe or other representative into Illinois to engage in selling activities, the out of state seller is engaged in the business of selling tangible personal property at retail in Illinois and is taxable on the gross receipts from a retail sale to an Illinois buyer, notwithstanding the fact that the buyer takes delivery of the article outside of Illinois and brings it himself into Illinois.

It is obvious that if the state of delivery, Indiana, can tax Class D sales and the buyer's state, Illinois, can tax retail sales in Class D, there is a double tax burden.

This is a question which the United States Supreme Court has not yet met in the application of the Indiana gross income tax. This Court declared definitely in the *Adams* case and in *Gwin, White & Prince v. Henneford*, 305 U. S. 435, not merely that actual multiple taxation of gross receipts from interstate transactions would not be permitted, but that a situation would not be permitted to arise where such multiple taxation could be imposed. It refused in that case to sustain the tax, because to sustain it would authorize other states to impose a similar tax. It was not merely an actual multiple tax which was forbidden. It was also the possibility or threat of a multiple tax which this Court opposed.

Ever since the decision of this Court in the case of *McGoldrick v. Berwind-White Coal Mining Co.*, *supra*, there has been doubt as to the implications of that decision on the taxation of gross receipts from interstate commerce. Can the state of the buyer tax such entire gross receipts without apportionment? Can the state of delivery to the buyer,

if different from the state of the buyer, also tax the entire gross receipts without apportionment? Likewise, can the state of manufacture tax them? Or is the state of the buyer sacrosanct and the only state which will be allowed to tax them?

We submit that it is important that these doubts be cleared up and that there is therefore a very substantial and important federal question as to whether both the state of delivery, Indiana, and the state of the buyer, Ohio, Kentucky or Illinois, can tax the gross receipts from such transactions as Class D sales.

CLASS C SALES

Class C sales are sales by branches of International Harvester Company located outside of Indiana to dealers and consumers residing in Indiana who took delivery of the goods themselves in Indiana. The goods were principally motor trucks manufactured at the Fort Wayne Works, Fort Wayne, Indiana, and a small amount of tillage implements manufactured by the Richmond Works, Richmond, Indiana.

Appellees state that the only extrastate element "involved in Class C sales was that due to the intra-corporate departmentalization of appellants' business." (Appellees' Counter Jurisdictional Statement, pp. 8, 10.)

We do not know what appellees mean when they say that "Appellant cannot avoid its tax burden by departmentalizing its business."

There is no departmentalizing of a business in the delivery of a motor truck from the factory in Fort Wayne to a buyer in Indiana.

The reference to departmentalizing the business is evidently taken from the case of *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, where Mr. Justice Douglas said, on page 364, that the mail orders from buyers in Iowa sent to Sears, Roebuck's Chicago office were still a part of Sears, Roebuck's Iowa business and that Sears, Roebuck. cannot "avoid that burden [namely the burden of collecting the use tax] though its business is departmentalized. Whatever may be the inspiration for these mail orders, however, they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa."

It will be noted that no tax was imposed on Sears, Roebuck on these mail order sales completed by shipment in interstate commerce to the retail buyers in Iowa. Sears, Roebuck was merely made the collection agency of the State of Iowa for the Iowa use tax on the consumer buying the goods.

But in imposing even that duty the Court stressed the point that Sears, Roebuck had retail stores in Iowa selling to consumers in the same town or district in which the mail order purchasers also lived. In other words, Sears, Roebuck made retail sales by mail order to Iowa consumers who lived in the same territory that was handled by the local retail stores in Iowa. One consumer in the same town would go to a retail store and another consumer in that town would send a mail order to Chicago. Sears, Roebuck's Iowa store was as available to serve the mail order customers as it was to serve those who bought at the store. This was a unitary business and the Court held only that there was no invalid burden on interstate commerce in requiring the seller to collect the use tax owing by the buyer on mail order purchases. International Harvester Company's Class C sales are all in-

terstate sales constituting a unitary interstate business unlike the essentially local business conducted by Sears, Roebuck.

Therefore, in Class C sales there is no question of departmentalizing the business. There is merely involved the question of division of the territory handled by the Company's branches. There is no departmentalization of business involved in the sale by a branch in one state to a buyer in another state.

Perhaps then the appellees mean that the appellants have arbitrarily divided the territory handled by their branches.

The whole record of this case shows, however, that appellants have not arbitrarily fixed the branch house areas of their business; that appellants have not established the trade areas in which their branches operate, but that the trade has made the areas and not the areas the trade.

John L. McCaffrey, Vice-President in Charge of Sales of International Harvester Company, testified that it is trade that makes the city and not the city that makes the trade; that the buyer goes where he wants to go and the seller cannot make him go where he does not want to go. (Record, pp. 97-98.)

The map of the Department of Commerce of the United States giving wholesale grocery areas in 1936 shows that the trade areas in Indiana and adjoining states for the wholesale grocery business are strikingly similar to the branch house areas of International Harvester Company (Exhibit 3, Record, p. 145c). The map of the Traffic World introduced in evidence in this case giving wholesale and retail trade areas in the United States also shows trade

areas in Indiana strikingly similar to the branch house areas of International Harvester Company. (Exhibit 2, Record, p. 145b.) The branches at Kankakee, Cincinnati and Louisville whose territories extend into Indiana have been long established at those places, and the dealers and farmers living in Indiana have dealt with those branches for many years.

If, therefore, a dealer or farmer in Indiana in the territory of the Cincinnati Branch or of the Kankakee or Louisville branches, finds that it would save him delivery expense to go to Fort Wayne and get his truck, or to Richmond, Indiana, and get his tillage implements, obviously that is what he will do. He is dealing with the branch he has dealt with for years and he is getting delivery in the quickest and cheapest way possible.

We submit, moreover, that it is inconsistent for appellees to argue that appellants have departmentalized their business in Class C sales when the buyer lives in Indiana and not to recognize that the same argument would deny the right to tax Class D sales.

In Class D sales the buyer lives outside of Indiana. The branch which made the sale is inside Indiana.

In Class C sales the buyer is in Indiana and the branch which made the sale is outside Indiana.

If it is departmentalizing the business in Class C for a branch located outside Indiana to sell to a buyer in Indiana, then it is departmentalizing the business in Class D for a branch located in Indiana to sell to a buyer outside Indiana. The sales in Class D on this argument should be treated as if made by a branch outside Indiana, and in that case Indiana would have no claim to tax the gross receipts from such sales.

Applying to Class D sales appellees' own theory for Class C sales, it is therefore evident that Indiana should not be able to tax gross receipts from Class D sales.

The transactions in Class C under the cases cited in our Jurisdictional Statement are clearly interstate transactions. If the rule of the Indiana Supreme Court is adopted, that the state of the buyer can tax the entire gross receipts from an interstate transaction, then it would seem that the rationale of the *Adams* case is in effect reversed and that there is no reason why the state of the seller in Class C cannot tax the entire gross receipts without apportionment, resulting in double taxation of the same gross receipts.

CLASS E SALES

Class E sales are sales by branches of International Harvester Company located inside Indiana to dealers and users in Indiana of goods shipped from outside Indiana to the buyers in Indiana pursuant to orders or contracts specifying that shipment should be so made.

Appellees assert that the only extrastate element in Class E sales was that the goods were delivered to a buyer in Indiana by shipment from an out of state point. Appellees add that "This Court has directly held that such shipment does not relieve the sale from taxation," citing *Allied Mills v. Department of Treasury*, — U. S. —, 87 L. Ed. 514, 63 S. Ct. 666; *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33.

We believe we have already sufficiently shown in our Jurisdictional Statement the controlling differences between the New York City gross receipts tax considered in *McGoldrick v. Berwind-White Coal Mining Co.*, *supra*, and the Indiana gross income tax.

There are also important differences between the situation in the *Allied Mills* case and the International Harvester case.

It does not appear from the decision in the *Allied Mills* case that there was any provision in the contract which required that the goods should be shipped from outside of Indiana to the buyers in Indiana.

In this case the stipulation of facts shows that the contracts or orders in each sale provided that the shipment should come from outside Indiana to the buyers in Indiana.

In the *Allied Mills* case it appeared that the designation of the factory branch which would make the shipment of feeds to the Indiana buyers was made by Allied Mills itself solely to gain the advantage of freight differentials.

In the International Harvester case, however, there was strong evidence showing that the branch house areas of International Harvester Company were strikingly similar to the trade areas in the wholesale grocery business and in wholesale business generally and that the farmers and dealers in each of the areas in Indiana had dealt with those branches over a period of many years.

Moreover, it is a fair conclusion from the evidence that if in Class E a shipment was made from out of the state at the buyer's own direction it was so made either because the branch in Indiana did not have the goods on hand or because there was a saving in freight by getting the shipment direct from the factory or transfer house to the buyer instead of the buyer paying the freight first to the branch house and then from the branch house to his own home town. There was strong evidence showing that no branch could be expected to keep on hand sufficient stock to handle

all its orders during the selling season but some would have to come from the factory or transfer house outside the state.

In short, it appears in this appeal that the shipment from out of state was not made for the seller's convenience but on the direction of the buyer who lived in a branch house area and that the delivery was made from outside the state either because the branch did not have the goods on hand or because there would be a freight saving to the buyer in getting direct shipment.

We feel, therefore, that this case is governed by the rule in the case of *Sonneborn Bros. v. Cureton*, 262 U. S. 506. In that case Mr. Chief Justice Taft said, on page 515, that many of the sales "by the appellees were made by them before the oil to fulfill the sale was sent to Texas. These were properly treated by the state authorities as exempt from state taxation. They were in effect contracts for the sale and delivery of the oil across state lines."

In the case of *Wiloil Co. v. Pennsylvania*, 294 U. S. 169, this Court made the exception that there was no provision in the contract requiring completion of the sale by shipment from outside of Pennsylvania and held the sale subject to tax.

The contracts in Class E did require shipment from outside of Indiana. Therefore, they fall within the rule of the *Sonneborn* case and outside the taxable exception laid down in the *Wiloil* case.

We submit, therefore, that there is an important federal question as to Class E sales as to whether they come within the rule laid down in the case of *Sonneborn Bros. v. Cureton*, *supra*.

Appellants accordingly respectfully submit that
appeal in this case should be allowed.

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at their

ellants.

FILE COPY

No. 355

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

ON APPEAL FROM THE SUPREME COURT OF INDIANA

INTERNATIONAL HARVESTER COMPANY AND
INTERNATIONAL HARVESTER COMPANY OF AMERICA,
Appellants,

v.

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA,
M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON, AND
FRANK G. THOMPSON, AS MEMBERS OF AND CON-
STITUTING THE BOARD OF DEPARTMENT OF
TREASURY,
Appellees.

APPELLANTS' BRIEF

EDWARD R. LEWIS,
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SUBJECT INDEX

	<i>Page</i>
Grounds on Which Jurisdiction of this Court is Invoked	1
Concise Statement of the Case.....	2
Specification of Assigned Errors Intended to be Urged	8
Summary of Argument.....	11
Argument	17
I. The tax on Class D sales would lay an unconstitutional burden on interstate commerce.....	24
II. The tax on Class C sales would lay an unconstitutional burden on interstate commerce.....	30
III. The tax on Class E sales would lay an unconstitutional burden on interstate commerce.....	34
IV. The tax on gross receipts from Classes C, D and E is in violation of the due process clause of the Fourteenth Amendment	35
Conclusion	36

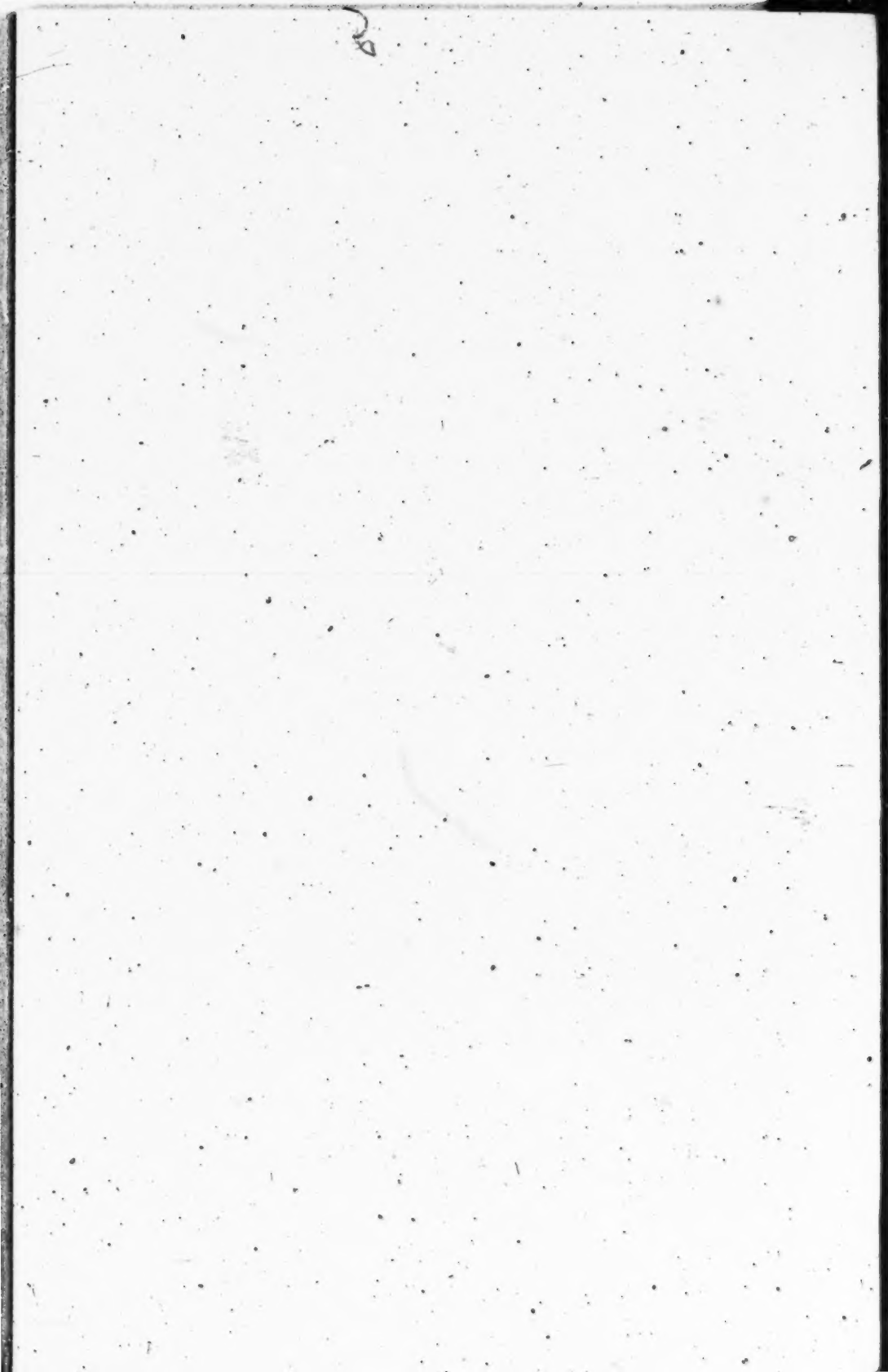
TABLE OF CASES

	<i>Page</i>
Allied Mills, Inc. v. Department of Treasury, 318 U. S.	
740	12, 20, 21, 22, 23, 26
Commissioner of Corporations v. Ford Motor Company,	
308 Mass. 558, 33 N. E. (2) 318.....	27
Cooney v. Mountain States Tel. & Tel. Co., 294 U. S.	
384	32
Curriu v. Wallace, 306 U. S. 1.....	25
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282	25
Department of Treasury v. Allied Mills, Inc., 42 N. E.	
(2d) 34	21
Department of Treasury v. International Harvester Co.,	
47 N. E. (2d) 130.....	1, 21, 26
Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62	
.....	21, 22, 23
Fisher's Blend Station v. State Tax Commission, 297	
U. S. 650.....	32
Gibbons v. Ogden, 9 Wheaton 1.....	15, 31
Gwin, White & Prince, Inc. v. Henneford, 305 U. S.	
434	18, 19, 22, 23, 27, 28
Hans Rees' Sons v. North Carolina, 283 U. S. 123.....	36
J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307.....	
.....	7, 11, 12, 17, 18, 19, 20, 21, 22, 23, 26, 27, 28, 33
McGoldrick v. A. H. DuGrenier, Inc., 309 U. S. 70.....	
.....	12, 19, 20, 21, 24, 26

	<i>Page</i>
McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33.....	12, 19, 20, 21, 22, 23, 24, 26
McGoldrick v. Felt & Tarrant Mfg. Co., 309 U. S. 70	12, 19, 20, 21, 22, 23, 24, 26
Newfield v. Ryan, 91 F. (2) 700; 302 U. S. 727, 777.....	32
Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1.....	31
Sonneborn Bros. v. Cureton, 262 U. S. 506.....	16, 34
Storen v. J. D. Adams Mfg. Co., 212 Ind. 343, 7 N. E. (2d) 941	2
U. S. v. Rock Royal Corp., Inc., 307 U. S. 533.....	26
Wiloil Corporation v. Pennsylvania, 294 U. S. 169.....	16, 34

Constitutions and Statutes

Constitution of the United States.....	9, 36
Commerce Clause	
Article I, Sec. 8.....	
Constitution of the United States, Fourteenth Amendment	10, 36, 37
Illinois Session Laws, 1943	
S. B. 512.....	13, 14, 29, 30, 39
Indiana Statutes, Acts 1933, Chapter 50	
Sec. 2	2, 38
Sec. 3	2, 38
Sec. 6	39



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No. 355

APPELLANTS' BRIEF

The case below is not yet reported in the Indiana official reports. It is found in 47 N. E. (2d), at page 150.

GROUND ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked on the ground that the judgment of the Supreme Court of Indiana sus-

tains taxes on transactions in interstate commerce in violation of the commerce clause of the federal Constitution and denies the appellants due process of law under the Fourteenth Amendment to the federal Constitution.

CONCISE STATEMENT OF THE CASE

This appeal involves the validity of the exaction of the Indiana gross income tax on gross receipts from three classes of sales made by the appellants in the years 1935 and 1936.

The tax was imposed by Section 2 of Chapter 50 of the Acts of the General Assembly of Indiana for the year 1933 (Acts of 1933, page 388), found in Burns Indiana Statutes Annotated, Section 64-2602. The rate of tax on wholesale sales was $\frac{1}{4}\%$ and on retail sales 1% (see Section 3 of said Act). Wholesale sales are sales for resale. Retail sales are sales to the consumer. *Storen v. J. D. Adams Mfg. Co.*, 212 Ind. 343, 7 N. E. (2d) 941.

Recovery of such taxes was denied by the Supreme Court of Indiana by its decision in this case.

The International Harvester Company is a New Jersey corporation with general offices in Chicago, Illinois (R. 23). The International Harvester Company of America was a Wisconsin corporation, all the capital stock of which was owned by the International Harvester Company, the parent company (R. 23). In 1935 the International Harvester Company of America marketed in Indiana the products manufactured by the International Harvester Company (R. 24). In 1936 the International Harvester Company marketed its own products directly, and the International Harvester Company of America has since been dissolved

(R. 23). By stipulation of the parties, it was agreed that the International Harvester Company should be treated as the sole plaintiff in this action (R. 24-25) and for that reason we use the word "appellant" hereinafter in this brief as covering both companies.

All the sales of the appellant are made through its selling branches. No sales are made by the factories (R. 33). The sales are made by the branches on orders received by the branches by mail or solicited by their salesmen (R. 33). All orders are subject to approval and acceptance by the Company's branch manager of the branch making the sale (R. 32). The general transfer warehouses of the Company are all located outside the State of Indiana, namely at Chicago and Moline, Illinois, Kansas City, Council Bluffs and St. Paul (R. 26).

The International Harvester Company had in 1935 and 1936 factories in Illinois, Ohio, Tennessee, New York, Wisconsin and Louisiana and two factories in Indiana, one at Fort Wayne, manufacturing motor trucks, and one at Richmond, manufacturing seeding machines and small tillage implements (R. 25). It had more than 100 selling branches in the United States (R. 55). Four of these selling branches were in Indiana at Indianapolis, Fort Wayne, Terre Haute and Evansville (R. 25), which sold to dealers and consumers in their trade areas, including parts of Indiana and parts of Ohio, Illinois and Kentucky (R. 28-31). It had a motor truck branch in Chicago selling in the Chicago trade area, including part of Lake County, Indiana (R. 28, 31), and general branches at Kankakee, Illinois, Louisville, Kentucky, and Cincinnati, Ohio, selling to buyers and consumers in the states where they were

located and also to dealers and consumers located in certain parts of Indiana (R. 30).

The branch house areas have been established for many years and long before the Indiana Gross Income Tax was enacted in 1933. The branch houses at Fort Wayne, Indianapolis, Terre Haute, Evansville and Cincinnati have been located at the above places since November 1, 1902. The branch house at Kankakee has been located there since November 1, 1903. The Louisville branch house was originally located there on November 1, 1902, but it was moved across the Ohio River to New Albany, Indiana, on October 12, 1911, and then back to Louisville on December 1, 1922, where it has since remained. The Chicago Motor Truck Branch was established January 1, 1917 (R. 32).

The branch house at Cincinnati for many years has served a trade area consisting of territory in southwestern Ohio, northeastern Kentucky and southeastern Indiana (R. 30). The branch at Kankakee has handled a trade area consisting of territory along both sides of the state line, in Illinois and Indiana (Plaintiff's Exhibit 1, R. 70, 93; also R. 30). The branch at Fort Wayne has handled a trade area consisting of territory in northeastern Indiana and in Ohio along the Indiana-Ohio border (R. 29). The branch at Evansville has handled territory in the tri-state trade area in nearby Kentucky, Illinois and Indiana (R. 28-29). The branch at Louisville has served the trade area in nearby Indiana and Kentucky (Plaintiff's Exhibit 1, R. 70, 93; also R. 30).

John L. McCaffrey, Vice President in Charge of Sales of the Appellant, testified: "The territory of the company's branches has been assigned to them as a result of many years of being in the business. These territories are well established business and economic areas, and correspond

to the areas as to local freight distribution and commerce as adopted and established by other lines of business and trade associations." (R. 59.) He was asked why, for example, Indianapolis was picked as a branch house city, and replied: "Because Indianapolis is a natural trading center for a certain radius of miles of counties and territory surrounding Indianapolis." (R. 59.) When asked: "What makes Indianapolis a trading center?" he answered: "I think the natural trade established a city rather than the city establishing the trading center. That is the point I have always held. If it was not a natural trading center, it would not be there. The fact that people have come there over a period of years, a good many years, has made it a city. That is how it came to be a city." (R. 59.)

Then he was asked what would be the effect if the Company told dealers and consumers, for example, now in the territory in southern Indiana of the Louisville branch, that they must deal with the Evansville branch, or customers of the Evansville branch living in Kentucky that they must deal with the Louisville branch, and he replied that "it would not work, if you did that, for the reason that you cannot bring a customer with his money where you want him, because he will go where he wants to go. In other words, it is not a natural place for him to do business. So naturally he will not go there. So we would have a constant turmoil of trying to direct people where they should go instead of the natural place where they will go." (R. 60.)

The Appellant introduced in evidence three maps. The first, Plaintiff's Exhibit 1 (R. 70, 93) showed the branch house areas of the International Harvester Company in the United States. The second, Plaintiff's Exhibit 2 (R.

71, 94), was a map entitled "Map of Key Distribution Areas," copyrighted 1936, prepared by the Traffic World, a national transportation news weekly. The third map (Plaintiff's Exhibit 3) was prepared by the United States Department of Commerce, entitled "Wholesale Grocery Trading Areas," published in 1938, (R. 73, 95).

On each map, southeastern Indiana is included in a trade area which includes part of Ohio and Kentucky and centers in Cincinnati. On each map Louisville is the center of a trade area which includes part of southern Indiana and part of central Kentucky. On each map southwestern Indiana is part of a trade area centering in Evansville, which includes part of Illinois and Kentucky. On each map Indianapolis is the center of a trade area which includes a large part of the central area of the state. In the Traffic World map (R. 71, 94) and the International Harvester Company's map (R. 70, 93), Terre Haute is the center of a trade area including part of west central Indiana and east central Illinois, and on the United States Department of Commerce map (R. 73, 95) a large portion of east central Illinois is included in the trade area centering in Indianapolis. On the International Harvester Company's map and the Traffic World map, Fort Wayne is the center of a trade area including parts of northeastern Indiana and a few Ohio counties on the Ohio-Indiana state line. In the Department of Commerce map the area centering in Fort Wayne does not extend into Ohio. On all three maps, northwestern Indiana and part of northeastern Illinois are in the same trade area.

The Complaint as filed sought recovery of taxes paid on six classes of sales designated as Classes A, B, C, D, E and F, but in the course of the litigation the Department of

Treasury conceded the non-taxability of gross receipts from the shipments in carload lots in Classes A (R. 42) and E (R. 46) and conceded all of Class B (R. 43). The International Harvester Company conceded the taxability of sales in Class F (R. 47).

The trial court by its judgment entered April 29, 1942, held that the Appellant was not entitled to recover any of the taxes paid on the remaining sales in Class E, but that Appellant was entitled to recover taxes on receipts from sales in Classes A, C and D, and it rendered judgment accordingly (R. 18, 19).*

The Supreme Court of Indiana affirmed the judgment of the trial court in Appellant's favor as to Class A (not involved in the present appeal), affirmed the trial court's judgment against Appellant as to Class E, reversed the trial court's judgment in Appellant's favor as to Classes C and D, and directed the trial court to render judgment as indicated by the Supreme Court's opinion. The Court's opinion stated that the transactions in Classes C, D and E were subject to the Indiana Gross Income Tax because "Neither of these classes presents a possibility of double taxation, since no other State could impose such a burden in view of the conclusions reached in the *J. D. Adams* case." (R. 108-111).

Therefore, the three classes involved in this appeal are as follows:

* The copy of the judgment of the trial court reproduced in the Record (R. 18-19) erroneously states as the finding of the trial court that Appellants should recover the tax paid on receipts from "retail sales in Classes A, C and D." The word "retail" did not so appear in the trial court's judgment. This error in the Record is inconsequential, however, because it elsewhere repeatedly appears in the Record that tax on both wholesale and retail sales was involved as to both the now remaining Classes C and D. See Stipulation of Facts filed with the trial court (R. 43-45).

Class C. Sales by branches located *outside* of Indiana, namely at Kankakee, Louisville and Cincinnati, and Chicago Motor Truck Branch, to dealers and consumers *residing* in Indiana; who went to the factory in Indiana, and there took delivery and possession of the purchased goods and transported the goods to their places of business or residence in Indiana. The goods were principally motor trucks manufactured at the Fort Wayne Works and a small amount of seeding machines and tillage implements manufactured by the Richmond Works. In all sales in this class the orders were accepted *outside* of Indiana and payment for the goods was received *outside* of Indiana. (R. 43-44.)

Class D. Sales by branches located *in* Indiana, namely at Evansville, Fort Wayne and Terre Haute, to dealers and consumers *residing outside* Indiana, who came to Indiana and took delivery of the purchased goods in Indiana and transported the goods back to their places of business or residence in Kentucky, Illinois or Ohio (R. 44-45).

Class E. Sales by branches *in* Indiana to dealers and consumers *in* Indiana of goods shipped by Appellant from *outside* the State of Indiana to buyers in the State of Indiana, pursuant to orders or contracts of sale specifying that shipment should be so made. The goods in Class E were manufactured outside Indiana (R. 45).

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED

Appellant urges the following errors assigned in its Assignment of Errors filed with the Clerk of the Supreme Court of Indiana on August 9, 1943 (R. 118):

"1. The Supreme Court of the State of Indiana erred in holding that the receipts of appellants from sales in Class C transactions are subject to the Indiana Gross Income Tax; and in refusing to hold that said tax on said receipts is an invalid and prohibited burden on interstate commerce under the commerce clause of the Constitution of the United States.

"2. The Supreme Court of the State of Indiana erred in holding that the entire gross receipts of appellants from sales in Class C transactions are subject to the Indiana Gross Income Tax without apportionment of said receipts between that part thereof derived from sources in Indiana and that part thereof derived from sources outside Indiana, and without limiting the application of said tax to that part of said receipts derived from Indiana sources; and in refusing to hold that said tax as applied to said receipts from Class C transactions is invalid under the due-process clause of the Fourteenth Amendment to the Constitution of the United States.

"3. The Supreme Court of the State of Indiana erred in holding that the receipts of appellants from sales in Class D transactions are subject to the Indiana Gross Income Tax; and in refusing to hold that said tax on said receipts is an invalid and prohibited burden on interstate commerce under the commerce clause of the Constitution of the United States.

"4. The Supreme Court of the State of Indiana erred in holding that the entire gross receipts of appellants from sales in Class D transactions are subject to the Indiana Gross Income Tax without apportionment of said receipts between that part thereof derived from sources in Indiana and that part thereof derived from sources outside Indiana,

and without limiting the application of said tax to that part of said receipts derived from Indiana sources; and in refusing to hold that said tax as applied to said receipts from Class D transactions is invalid under the due process clause of Fourteenth Amendment to the Constitution of the United States.

"5. The Supreme Court of the State of Indiana erred in holding that the receipts of appellants from sales in Class E transactions are subject to the Indiana Gross Income Tax; and in refusing to hold that said tax on said receipts is an invalid and prohibited burden on interstate commerce under the commerce clause of the Constitution of the United States.

"6. The Supreme Court of the State of Indiana erred in holding that the entire gross receipts of appellants from sales in Class E transactions are subject to the Indiana Gross Income Tax without apportionment of said receipts between that part thereof derived from sources in Indiana and that part thereof derived from sources outside Indiana, and without limiting the application of said tax to that part of said receipts derived from Indiana sources; and in refusing to hold that said tax as applied to said receipts from Class E transactions is invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States." (R. pp. 118-120.)

SUMMARY OF ARGUMENT

The chief contention of appellant as to each of the Classes C, D and E involved in this appeal is that if the tax levied by the State of Indiana is sustained, the same gross receipts will be open to tax, without apportionment, in other states, and a multiple tax burden accordingly will be laid thereon which is forbidden by the commerce clause of the United States Constitution.

This is most strikingly shown in Class D. In Class D the Supreme Court of Indiana has sustained a tax by Indiana, the state of delivery, on the entire gross receipts and yet in its very opinion declares that this Court has held that the state of the buyer can tax the same entire gross receipts.

The state of the buyer in Class D is not Indiana, but Ohio, Kentucky or Illinois.

The Supreme Court of Indiana takes the position that this Court has held that "the tax may be levied by the buyer's state regardless of the incidental interstate nature of the transaction." It declares that none of the above Classes C, D or E "presents a possibility of double taxation since no other state could impose such a burden in view of the conclusions reached in the *J. D. Adams* case." In short, the Indiana Supreme Court concludes that this Court has held that the buyer's state can tax gross receipts in interstate transactions and that no other state can tax them and that, therefore, there is no danger of multiple taxation. And yet in this very case it has sustained a tax on Class D sales by the state of delivery!

The Indiana Supreme Court believes that the principle that the buyer's state may tax was "sustained" by the *per curiam* decision of this Court in *Allied Mills, Inc. v. Department of Treasury*, 318 U. S. 740, affirming without opinion the decision of the Indiana Supreme Court in *Department of Treasury v. Allied Mills, Inc.*, 42 N. E. (2d) 34. We believe this conclusion is based on a fundamental misunderstanding of the case of *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, and the New York City sales tax cases, one of which, *McGoldrick v. Felt & Tarrant Mfg. Co.*, 309 U. S. 70, was cited by this Court in the *per curiam* decision in the *Allied Mills* case.

We shall contend in our Argument *infra* that there are vital and controlling differences between the Indiana Gross Income Tax levied against the seller on gross receipts from all sources, including wholesale sales which were not conditioned on a local activity, and the New York City sales tax which was levied against the buyers on receipts from local services, and from retail sales conditioned on a local activity, i.e., the transfer of title or delivery of possession in New York City. These distinctions, we submit, this Court fully recognized in its decision in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, where it said that "The rationale of the *Adams Manufacturing Co.* case does not call for condemnation of the present tax. Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption." (P. 58.)

It is our contention that if the tax on the Appellant's Classes C, D and E is sustained, the *Adams* case is in effect reversed, and the way is thrown open for the state of the seller, the state of the buyer, the state of the manu-

facturer, the state where the sales proceeds are received, and every other state which the transaction touches, to tax the entire gross receipts without apportionment.

We will now briefly take up the three classes in turn.

Class D Sales

We take up Class D sales first because Class D most strikingly presents the threat of multiple taxation of gross receipts from interstate commerce.

Briefly, again, Class D sales are sales by the branches at Evansville, Fort Wayne and Terre Haute to buyers in the territories of those branches *outside* of Indiana who came either to one of the above three branches or to the factory at Fort Wayne or Richmond, took delivery of the purchased goods and transported them back to their places of business or residence in Kentucky, Ohio or Illinois.

In Class D sales the state of the buyer was *outside* Indiana and the selling branches of the appellant were located inside Indiana. Therefore, the very reason given by the Supreme Court of Indiana in the instant case, namely, that this Court has held that the buyer's state can tax, does not, and indeed could not, apply to the tax on Class D sales, since Indiana is *not* the buyer's state in Class D sales.

It follows as an inescapable conclusion that if the Indiana Supreme Court is correct in its understanding that this Court has held that the state of the buyer can tax (namely, in Class D, Ohio, Kentucky or Illinois) and if the state of delivery (namely, Indiana) can also tax as the Indiana Supreme Court has actually held, then inevitably double taxation is involved.

Moreover, as we shall show below, Illinois in 1943 after this case was decided by the Indiana Supreme Court, amended its Retailers Occupation Tax to apply to all sales of an out of state seller to an Illinois consumer where the Illinois consumer gets delivery of the article in the state of the out of state seller and brings it to his home in Illinois.

That is, Illinois says that if an out of state seller sends an employee or other representative into Illinois to engage in selling activities, the out of state seller is engaged in the business of selling tangible personal property at retail in Illinois and is taxable on the gross receipts from a retail sale to an Illinois buyer notwithstanding that the buyer takes delivery of the article outside Illinois and brings it himself into Illinois.

In short, under this new amendment of the Illinois Retailers Occupation tax, if the branch of the International Harvester Company at Evansville or Terre Haute, both of which have Illinois territory, solicits a sale to an Illinois consumer and the Illinois consumer comes to the branch at Terre Haute or the branch at Evansville and gets the article and pays for it there and takes it back to his home in Illinois, the International Harvester Company is taxable on that sale under the Illinois Retailers Occupation tax as now amended.

Yet this is exactly the kind of sale that is also taxed in Indiana under Class D; that is, the Supreme Court of Indiana has held in this case that the branch at Terre Haute or the branch at Evansville is subject to the Indiana Gross Income Tax on the very same sale.

Class C Sales

We repeat briefly that Class C sales are sales by branches of the International Harvester Company located

outside of Indiana to dealers and consumers residing inside Indiana who took delivery of the goods themselves in Indiana.

It is true that there was no movement across state lines of the *articles* sold in Class C sales. But there was continuous intercourse across state lines in order to effect these sales. The branch in Ohio, Kentucky or Illinois solicited an order from the buyer in Indiana or the buyer in Indiana sent an order to the branch of the appellant at Cincinnati or Kankakee or Louisville. The branch at Kankakee, Cincinnati or Louisville accepted the order. The branch at Kankakee, Cincinnati or Louisville directed the Fort Wayne works of the appellant at Fort Wayne, Indiana, or the Richmond works of the appellant at Richmond, Indiana, to deliver the article to the buyer in Indiana. The buyer in Indiana made payment either in cash or notes to the branch at Kankakee, Louisville or Cincinnati.

This Court has held ever since the case of *Gibbons v. Ogden*, 9 Wheaton 1, that commerce is more than traffic, "it is intercourse", and it has held that the transmission of radio messages, telegraph and telephone messages, are transactions in interstate commerce.

The sales in Class C have every element of an interstate transaction except that the final delivery of the article to the buyer was made in Indiana.

We submit that if Indiana, the state of the buyer, can tax such transactions as Class C sales then the *J. D. Adams* case is in effect reversed and the way is thrown open for both the state of the seller and the state of the buyer to tax, without apportionment, gross receipts in interstate commerce transactions. There is no reason for preferring the state of the buyer to the state of the seller.

Class E Sales

Class E sales are sales by the branches in Indiana to buyers in Indiana where the order or contract of sale provided that the goods should be shipped and the goods were shipped from outside Indiana to the buyer in Indiana.

These sales come squarely within the rule of the case of *Sonneborn Bros. v. Cureton*, 262 U. S. 506, which held that such a transaction was in interstate commerce and that a gross receipts tax could not be laid on the proceeds.

Wiloil Corporation v. Pennsylvania, 294 U. S. 169, does not, we submit, modify the rule laid down in *Sonneborn Bros. v. Cureton*, *supra*. For in the Wiloil case this Court expressly stated that the contracts there involved "did not require or necessarily involve transportation across the state boundary" (p. 174). In our case the contracts did so require (R. 45).

ARGUMENT

Before proceeding to a consideration of the special issues involved in each of the Classes C, D and E, we wish to present the situation as we understand it which has resulted from the recent decisions of this Court.

The essential question on this appeal is whether the International Harvester Company can be required by the State of Indiana to pay tax on the entire gross receipts from interstate transactions when it will be laid open to a tax on the same entire gross receipts by other states which the transactions touch.

This Court has definitely held in the case of the very gross income tax now in question that interstate business cannot be required to pay the Indiana Gross Income Tax on the entire gross receipts received in interstate transactions.

In *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, the seller located in Indiana manufactured road machinery in Indiana, accepted orders for the sale thereof from buyers in other states and foreign countries and shipped the goods from the factory in Indianapolis to the buyers in other states and foreign countries. This Court held that the gross receipts from such sales by the J. D. Adams Mfg. Co. could not be taxed by Indiana under the Indiana Gross Income Tax. It said:

"The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful

it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by article 1, section 8, of the Constitution." 304 U. S. 307, 311.

This position was emphatically affirmed in the case of *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, involving a state of Washington tax on gross receipts on the business of marketing fruit shipped from Washington to places of sale in other states and foreign countries. The Court adverted to the expression that "even interstate business must pay its way by bearing its share of local tax burdens," but said that it was "enough for present purposes that under the commerce clause, in the absence of Congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to the activities carried on within the state (citing cases) burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject." (Pp. 438-9.)

The decisions in the *J. D. Adams* case and the *Gwin, White & Prince* case definitely settled that since the Indi-

ana Gross Income Tax is a tax on gross receipts from all sources, wages, salaries, fees, commissions, interests, dividends and rents, and also receipts from sales, not only retail sales but wholesale sales, and since therefore it was a tax which if applied by one jurisdiction to the entire receipts can also be applied without apportionment to the entire gross receipts by two, three or half a dozen jurisdictions which the transactions touch, that therefore no one of them would be allowed to tax the entire gross receipts.

The decisions in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, and companion cases of *McGoldrick v. Felt & Tarrant Mfg. Co.*, and *McGoldrick v. A. H. DuGrenier, Inc.*, 309 U. S. 70, expressly approved the Adams case. These cases arose under the New York City sales tax of 1% on retail sales where transfer of title or delivery of possession of the goods was effected in New York City. The tax was not a general gross receipts tax levied on the seller as is the Indiana gross income tax but it was a tax on the buyer limited solely to receipts from retail sales and local services. In each case the buyer was located in New York City, the order was taken there and possession of the goods was delivered to the buyer there.

This Court sustained the tax in all three cases, stating that the tax was laid "upon every purchaser within the state of goods for consumption" (p. 49).

The Court distinctly recognized its previous opinion in *J. D. Adams Mfg. Co. v. Storen, supra*, but said emphatically: "The rationale of the Adams Mfg. Co. case does not call for condemnation of the present tax. Here the tax is conditioned upon a local activity, delivery of goods within the State upon their purchase for consumption" (p. 58).

The implication was clear that the Indiana Gross Income Tax was not conditioned on a local activity, and it was definitely held that the rule in the *J. D. Adams* case was not affected by the decision in *McGoldrick v. Berwind-White Coal Mining Co.*, *supra*, and the companion cases.

The Indiana Supreme Court, however, seems to think that this conclusion was thrown in doubt by the case of *Allied Mills, Inc. v. Department of Treasury*, 318 U. S. 740, rehearing denied 801, 87 Law. Ed. 514, 724, 63 S. Ct. 666, 830, where this Court affirmed the judgment of the Supreme Court of Indiana in a *per curiam* opinion, merely citing the cases of *McGoldrick v. Felt & Tarrant Mfg. Co.*, 309 U. S. 70, and *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62.

The facts in the case of *Allied Mills, Inc.* were the reverse of the facts in the *Adams* case. In the *Allied Mills* case the sale of livestock feeds was made by Allied Mills, Inc., an Indiana corporation, to buyers in Indiana, on contracts approved by factory branches of Allied Mills in Illinois, and the feeds were shipped from those factory branches to the buyers in Indiana.

The Indiana Supreme Court in its opinion in the instant case upheld the tax on all three Classes, C, D, and E, on the authority of the *Allied Mills* case. It stated:

"In *Department of Treasury v. Allied Mills, Inc.*, 42 N. E. (2d) 34, we interpreted the *Adams* case as meaning that the tax may be levied by the buyer's state regardless of the incidental interstate nature of the transaction. This view was sustained by the Supreme Court. *Allied Mills v. Department of Treasury* (1943), 318 U. S. 740.

"Applying the above decisions to the case at bar, it seems clear that transactions under Classes C, D and E are subject to our gross income tax. Neither of these classes presents a possibility of double taxation, since no other state could impose such a burden in view of the conclusions reached in the J. D. Adams case." (47 N. E. (2d) 150, 152).

Since the *per curiam* decision of this Court in the *Allied Mills* case affirmed the decision of the Supreme Court of Indiana reaching a result directly contrary to the definite rule of the Adams case (which was approved in *McGoldrick v. Berwind-White Coal Mining Co.*, *supra*), we can only conclude that this Court in its memorandum opinion in the *Allied Mills* case, where it merely cited *McGoldrick v. Felt & Tarrant Mfg. Co.*, decided on the same day as the *Berwind-White Coal Mining Co.* case, its companion case, and a California Use Tax case, *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62, did not realize that the *Allied Mills* case involved a gross income tax on gross receipts from wholesale sales in interstate commerce under the Indiana Gross Income Tax Act, an entirely different tax from those considered in the two cases cited.

As we have noted, this Court said in the *Berwind-White* decision that, "the rationale of the J. D. Adams Manufacturing Co. case does not call for condemnation" of the New York City tax. *McGoldrick v. Felt & Tarrant Mfg. Co.*, *supra*, would therefore be no authority for sustaining the tax in the *Allied Mills* case.

Felt & Tarrant Mfg. Co. v. Gallagher, *supra*, was a case under the California Use Tax, a tax conditioned on a local activity, namely, the use of the article in the state

of California, and wholly different from a tax on gross receipts from all sources.

The Supreme Court of Indiana, however, in its opinion in the case at bar, interpreted the *per curiam* opinion of this Court in the *Allied Mills* case as meaning that the state of the buyer may levy a gross income tax, without apportionment, on gross receipts from sales by a seller in another state, although the *ratio decidendi* of the decision in the *Adams* case denied the right of the state of the seller to levy the Indiana Gross Income Tax, without apportionment, on gross receipts from interstate commerce transactions, and the rationale of that decision denied the right of any state to levy a tax in that form on interstate sales.

The state court's conclusions therefore are that this Court has held that the state of the buyer may levy such a tax and that no other state can impose a similar burden. We submit that both these conclusions are wholly unauthorized by the decisions of this Court, and that this theory, far from being supported by the *J. D. Adams* case, is flatly opposed to the rule laid down in the *Adams* case which was reaffirmed in *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434.

We do not understand that the *Adams* case means, in the words of the Indiana Supreme Court in this case, that the tax may be levied by the buyer's state regardless of the incidental interstate nature of the transaction. We understand rather that this Court held in the *Adams* case and in the *Gwin, White & Prince* case that if the state of the seller could tax the entire gross receipts, without apportionment, then the state of the buyer, the state of the manufacturer, the state of approval of the contract and

receipt of the sales proceeds, and all other states which the transaction touches, could do likewise, and that there was consequently a danger of multiple taxation, and accordingly that no state would be allowed to tax the entire gross receipts of such a transaction.

The New York City sales tax case of *McGoldrick v. Felt & Tarrant Mfg. Co.*, *supra*, and the California use tax case of *Felt & Tarrant Mfg. Co. v. Gallagher*, *supra*, which this Court cited in its memorandum opinion in the *Allied Mills* case, involved taxes entirely different in their scope and nature from the Indiana Gross Income Tax, as this Court itself held in the *Adams* case, and reaffirmed in the *Berwind-White Coal Mining Co.* case. The New York City tax as applied by this Court in the above and companion cases, is a tax laid on the *buyer*, measured by receipts only from retail sales where the seller's office which handled the business and the buyer were both located in New York City, and the tax was conditioned on a local event, namely, the passing of title or transfer of possession in New York City. This local event could take place only once, and only in one place.

The California Use Tax obviously was a tax on a local event occurring in only one jurisdiction.

The Indiana tax, however, is a tax on the *seller*, laid on gross receipts from both wholesale and retail sales, and from wages, salaries, rents, interest, profits and gains of all kinds. It is laid not only on retail sales as the New York City tax was, but also on wholesale sales. In the case of a retail sale this Court pointed out in the New York City cases that the article "has been transported in interstate commerce and brought to its journey's end." *McGoldrick v. Berwind-White Coal Mining Co.*, *supra*, page 49.

In the case of a wholesale sale, however, the article has not come to its journey's end but is to be resold by the purchaser. Therefore, as this Court also said in the New York City cases, the New York City tax did not lay the purchaser open to the danger of multiple taxation. But the obligation of the Indiana tax is laid on the seller, and inevitably lays the seller open to the threat of multiple taxation.

We believe that the foregoing analysis of the recent history of the cases involving interstate commerce taxation has been necessary before we proceed to an examination of the tax in each of the classes involved in this appeal.

We now wish to take up each class in turn.

I.

THE TAX ON CLASS D SALES WOULD LAY THE APPELLANT OPEN TO THE THREAT OF A MULTIPLE TAX BURDEN ON GROSS RECEIPTS FROM THE SAME TRANSACTIONS AND THEREFORE WOULD BE A BURDEN ON TRANSACTIONS IN INTERSTATE COMMERCE, FORBIDDEN BY THE COMMERCE CLAUSE.

We take up Class D sales first because Class D most strikingly presents the threat of multiple taxation on gross receipts from interstate transactions. It presents the question whether a tax will be sustained by the state where delivery to the buyer takes place when at the same time the way is laid open for a tax to be imposed by the state where the buyer resides and also by every other state which the transaction touches.

Class D sales are sales by an International Harvester branch house in Indiana to a buyer, either a dealer or

consumer, in Kentucky, Ohio or Illinois, where the goods were delivered to the buyer in Indiana and taken by the buyer back to his home town in Kentucky, Ohio or Illinois.

This Court has repeatedly held that the purchase of goods in one state for the purpose of transporting them immediately to another state is a transaction in interstate commerce.

In *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, in which the Dahnke-Walker Company purchased wheat in Kentucky, where the wheat was put on board railroad cars and shipped to the mill of the Dahnke-Walker Company in Union City, Tennessee, this Court held that the transaction was a transaction in interstate commerce. The Court said. (p. 290) that "where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation."

The same language was used in *Currin v. Wallace*, 306 U. S. 1, involving the constitutionality of the Tobacco Inspection Act applying to the sale of tobacco at auction. It was objected that the sale of tobacco at auction in one state was an intrastate transaction, but the Court held that the auction was manifestly a part of the transaction of sale, and that so far as the sales were for shipment to other states or to foreign countries, "it is idle to contend that they are not sales in interstate or foreign commerce and subject to congressional regulation" (p. 10).

To the same effect is *United States v. Rock-Royal Co-operative, Inc.*, 307 U. S. 533.

The fact, then, that the transactions in Class D are in interstate commerce necessarily throws them open to

attempts to tax by the state of delivery, by the state of the buyer, and by other states which the transaction touches. This being so, we submit that the vice of multiple taxation, which this Court has specifically found obnoxious to the commerce clause in the *Adams* case and the *Gwin, White & Prince* case, equally renders the Indiana gross income tax unconstitutional as applied to sales in Class D.

Before passing to a further discussion of this contention, however, we desire to bring briefly to the Court's attention the fact that, as respects Class D sales, the very words of the Indiana Supreme Court itself in its opinion in the case at bar demonstrate that sales in that class cannot constitutionally be taxed. As we have stated above, the Indiana Supreme Court in its opinion announced two conclusions: (1) that this Court by its memorandum opinion in the *Allied Mills* case held that the buyer's state can tax and (2) that in the case at bar there is no danger of multiple taxation because no other state can tax. So far as the opinion shows, these propositions constituted the *ratio decidendi* of the Indiana Supreme Court in its opinion. While we do not agree with either conclusion and think that both conclusions are based on a crucial misunderstanding of the decisions of this Court in the *Adams* case and in the New York City cases, we point out that if the conclusions of the Indiana Supreme Court are correct, Class D sales would, for no other reasons than those stated by the Indiana Supreme Court, have to be held exempt from the Indiana Gross Income Tax. For in the case of all Class D sales the state of the buyer is Ohio, Kentucky or Illinois and the state of delivery to the buyer is Indiana. Hence, if only the state of the buyer can tax, certainly Indiana cannot tax in Class D sales. This irrefutable logic seems to have escaped the Indiana Supreme Court.

We do not believe, however, that the case at bar, or any other case involving state taxes on gross receipts from interstate commerce, is to be decided by the application of the rule that the state of the buyer can tax. We think, rather, that the controlling principle is to be found in the decisions of this Court in the *Adams* case and in the *Gwin, White & Prince* case, viz., that no state law can be held valid which attempts to levy a tax, without apportionment, on gross receipts from interstate commerce in any case where there is a danger that the same gross receipts will be taxed by another state or other states. Obviously, therefore, if the Indiana Supreme Court was correct in its conclusion that the state of the buyer can tax, it has by its *decision* that Indiana can tax Class D sales approved double taxation on the same gross receipts from interstate commerce, in the very teeth of the controlling principle enunciated by this Court in the *Adams* and *Gwin, White & Prince* cases.

In short, the "drive-away" sales which constitute Class D present inescapably the likelihood of double if not multiple taxation of the same gross receipts. In *Commissioner of Corporations and Taxation v. Ford Motor Company*, 308 Mass. 558, 33 N. E. (2d) 318, the identical situation was involved under the Massachusetts excise tax based on net income. The Ford Motor Company delivered automobiles to its out of state dealers at its factory at Somerville, Massachusetts, and the out of state dealers drove them to "their respective districts all of which were beyond the boundaries of this Commonwealth" (page 323). The Court held that these sales were sales in interstate commerce and could not be included as Massachusetts sales in the measure of the Massachusetts excise tax on foreign corporations.

We think it clear that it was because of this manifest possibility of multiple taxation in gross receipts tax cases that this Court held in the *J. D. Adams Mfg. Co.* case and in *Gwin, White & Prince, Inc. v. Henneford, supra*, that where the transaction was such that if one state could tax the entire gross receipts, then four, five or six could do so, then none of them would be permitted to do so.

We do not understand that it is necessary for the taxpayer to show that there has been actual multiple taxation in such cases. This Court definitely held in the *Adams* and *Gwin, White & Prince* cases not merely that actual multiple taxation of gross receipts from interstate transactions would not be permitted, but that a situation would not be permitted to arise where such multiple taxation could be imposed. It refused in those cases to sustain the tax, because to sustain it would authorize other states to impose similar taxes. In *Gwin, White & Prince, Inc. v. Henneford, supra*, the Court said (page 440):

“Unlawfulness of the burden depends upon its nature measured in terms of its capacity to obstruct commerce and not on the contingency that some other state may first have subjected the commerce to a like burden.”

It is not, therefore, merely a multiple tax which is forbidden. It is also the possibility or threat of multiple taxation which this Court has resolutely opposed.

If the rule laid down by the Supreme Court of Indiana is sustained that the buyer's state can tax gross receipts from interstate sales, the state in which the buyer lives will surely be encouraged to assert the right to tax the seller on the gross receipts of the sale.

Indeed, it is apparent that the opportunity for the buyer's state to tax the sale on gross receipts from such sales as Class D sales is too tempting to be resisted. An actual demonstration of an attempt to that end has already been given by the State of Illinois. Since the decision of the Indiana Supreme Court in this case, the Illinois Legislature in 1943 amended the Illinois Retailers' Occupation Tax (S. B. 512, Illinois Laws 1943, effective July 1, 1943) by adding Section 1b. The amendment provides that a "person" is engaged in the business of selling tangible personal property at retail in Illinois whenever that person habitually engages in selling activities in Illinois, the primary purpose of which is to promote the sale at retail of tangible personal property by such person, and that such person is subject to the Illinois Retailers' Occupation Tax, notwithstanding that the orders for such property are accepted outside Illinois, and notwithstanding that the tangible personal property which is sold as the result of such selling activities was not in Illinois at the time of sale, and notwithstanding that the ownership or title to the tangible personal property is not transferred in Illinois to the purchaser. In other words, under the new amendment of the Illinois Retailers' Occupation Tax (assuming its validity) if a buyer living in Illinois purchases an article from the Terre Haute branch of the International Harvester Company, or from the Evansville branch, both of which have Illinois territory, and obtains delivery of that article in Indiana and brings the article back himself to his home in Illinois, the International Harvester Company would be a "person" engaged in selling activity in Illinois and would be subject to the Illinois Retailers' Occupation Tax on the sale. And yet, if the Indiana Supreme Court is right in

its decision in the instant case, the International Harvester Company will also be subject to the Indiana Gross Income Tax on the same sale, since the sale is a class D sale.

In summary as to Class D sales, we submit that the transactions were transactions in interstate commerce and that they should have all the protection from multiple taxation that is granted to sales in interstate commerce. The threat of multiple taxation in Class D is immediate and real. The Supreme Court of Indiana has already held that the state of delivery can tax. The Supreme Court of Indiana has already held generally that the state of the buyer can tax. There is not only a threat of double taxation but of multiple taxation by every state which the transaction touches.

II

THE TAX ON CLASS C SALES LAYS THE APPELLANT OPEN TO THE THREAT OF A MULTIPLE TAX BURDEN ON GROSS RECEIPTS FROM THE SAME TRANSACTION, AND THEREFORE IS A BURDEN ON TRANSACTIONS IN INTERSTATE COMMERCE, FORBIDDEN BY THE COMMERCE CLAUSE.

Class C sales are sales by branches of the International Harvester located *outside* the State of Indiana to dealers and consumers *residing in* Indiana, who took delivery of the goods themselves in Indiana. The goods were principally motor trucks manufactured at the Fort Wayne Works of the Appellant at Fort Wayne, Indiana, and a small amount of tillage implements manufactured by the Richmond Works at Richmond, Indiana. The branches which made the sales were in Ohio, Kentucky or Illinois. A branch outside Indiana accepted the order or contract, and

directed the factory in Indiana to deliver the goods to the buyer who would call for them. The branch outside Indiana received the entire sales proceeds, either cash or notes, and when the notes were due received payment on the notes.

In Class C sales it is submitted that the interstate transaction was unbroken from the time the contract was made by a sales branch at Cincinnati, Louisville or Kankakee to the buyer in Indiana until the motor truck or seeding machine reached the buyer's home town in Indiana. The transaction started with a contract made in Ohio, Kentucky or Illinois and was not completed until the goods came to rest at the buyer's home town in Indiana.

From the day of *Gibbons v. Ogden*, 9 Wheaton 1, it has been recognized; in the words of Chief Justice Marshall, that commerce is "undoubtedly traffic but it is something more, it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches and is regulated by prescribing rules for carrying on that intercourse."

It has been held that the transmission of telegrams, of telephone messages and of radio messages are transactions in interstate commerce.

Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1;

Fisher's Blend Station, Inc. v. State Tax Commission, 297 U. S. 650;

Newfield v. Ryan, 91 Fed. (2d) 700, Certiorari denied 302 U. S. 729, Rehearing denied 302 U. S. 777;

Cooney v. Mountain States Telephone & Telegraph Co., 294 U. S. 384.

The evidence showed that the business involved in Class C sales was handled by branches which for a long time had served territories including areas in Indiana. The branches at Cincinnati, Louisville and Kankakee and the motor truck branch at Chicago were established many years ago.

There was also evidence showing a material saving in delivery charges by the dealer making his own delivery. Plaintiff's Exhibit No. 6 showed, for example, that an independent trucking company's charge for a driveaway from the Fort Wayne Works to Brookville, Indiana, would be \$10.81, and if the truck were delivered from the Cincinnati branch house the charge would be \$36.50. If a dealer went to Fort Wayne and got the truck himself and drove it to Brookville, his cost would be only for his own time and his gas and oil and other expenses in driving from Brookville to Fort Wayne and back again to Brookville. (R. 86, 99.)

If, therefore, a dealer or farmer in Indiana in the territory of the Cincinnati branch or the Kankakee or Louisville branch found that it would save him delivery expense to go to Fort Wayne and get his truck, or to go to Richmond, Indiana, and get his tillage implement, obviously that is what he would do. He was dealing with the branch he habitually dealt with, and was getting delivery in the cheapest and quickest way possible.

In Class C there is every interstate feature present except that to save transportation charges on shipments from the out of state branch the buyer obtained the goods at the factory in Indiana, and there was therefore no actual shipment across a state line. Under the decisions above cited, however, the transaction is nevertheless an interstate

sale of goods. There is an interstate sale between a seller outside the State of Indiana to a buyer inside Indiana.

In the *J. D. Adams* case, the seller's state sought to levy the tax. In Class C sales Indiana is the buyer's state and Indiana, the buyer's state, seeks to lay the tax.

This Court said in the *Adams* case that the seller's state could not tax gross receipts because to permit it to levy a tax of the character of the Indiana Gross Income Tax would lay the way open for the buyer's state also to levy a tax on the entire gross receipts. We submit that if Indiana, the state of the buyer, is permitted to levy the tax on the entire proceeds of Class C sales, then the *Adams* case is in effect reversed and the way is open both for the state of the buyer and the state of the seller to lay a gross income tax on the entire gross receipts. In short, we can see nothing sacrosanct about the state of the buyer.

We can see no reason, except for the protection afforded by the commerce clause, why Ohio or Kentucky or Illinois, the state of the seller in Class C, the state where the contract is approved and the sales proceeds received, could not tax the receipt of the entire sales proceeds.

In the case of Class C sales, therefore, as in the case of Class D sales, the question is how many states will be allowed to levy a gross income tax on the entire gross receipts from an interstate transaction? None, under the applicable decisions of this Court, unless the tax is so apportioned by legislative enactment, federal or state, as to prevent the penalizing of interstate commerce.

III.

CLASS E

CLASS E SALES ARE SALES IN INTERSTATE COMMERCE, AND INDIANA'S ATTEMPT TO LEVY A GROSS INCOME TAX ON THE ENTIRE GROSS RECEIPTS THEREFROM CASTS AN UNCONSTITUTIONAL BURDEN ON INTERSTATE COMMERCE.

Class E sales are sales by branches of the International Harvester Company located inside Indiana to dealers and consumers in Indiana of goods shipped from *outside* the State of Indiana, pursuant to orders or contracts specifying that shipment should be so made.

For many years it has been generally agreed that where goods are shipped by a seller in one state to a buyer in another state the sale is in interstate commerce and that the gross receipts therefrom are not subject to tax either by the state from which the goods are shipped or by the state to which they are shipped.

This Court so held in *Sonneborn Bros. v. Cureton*, 262 U. S. 506.

In *Wiloil Corporation v. Pennsylvania*, 294 U. S. 169, this Court stated that the *Sonneborn* case rule did not apply where there was no provision in the contract for interstate shipment and interstate shipment was "not required or contemplated" (p. 175).

But in Class E sales the interstate shipment was required and contemplated; it was made pursuant to a specification in the order or contract. (R. 45.) And the evidence also showed that there were compelling business reasons

for making the shipment from outside of Indiana to the buyer in Indiana, either because the freight was cheaper that way or because the branch in Indiana did not have the goods on hand when shipment was required, or for both reasons. (R. 33; 62-63; 77; Plaintiff's Exhibit 5, R. 84, 97.)

IV.

A TAX ON APPELLANT'S GROSS RECEIPTS FROM SALES IN CLASSES C, D AND E IS A TAX ON PROPERTY LOCATED AND BUSINESS DONE OUTSIDE THE STATE OF INDIANA, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Indiana Gross Income Tax is a tax on the entire gross receipts derived from the sale of goods in Classes C, D and E. These gross receipts arose from the entire activity, partly manufacturing, partly selling, partly administrative. No apportionment is made or attempted by the statute between that part of the gross receipts arising from Indiana activities and that part of the gross receipts arising from activities outside Indiana.

In Class C all the selling activities were conducted by branches outside of Indiana. In Class E the manufacturing was done outside Indiana. In Class D the purchasers were outside of Indiana and the sales proceeds therefore came from outside Indiana.

It is obvious therefore that the entire gross income in all of the Classes, C, D and E, was derived from activities partly inside and partly outside Indiana. Yet the State of Indiana has laid a tax on the entire gross receipts without apportionment.

In *Hans Rees Sons v. North Carolina*, 283 U. S. 123, this Court held that where the corporation manufactured its goods in North Carolina and sold them in New York, the entire net income from the manufacture and sale of the goods could not under the due process clause be taxed "in one state regardless of the extent to which it may be derived from the conduct of the enterprise in another state," (p. 133.) *A fortiori*, one state cannot under the due process clause tax the entire gross income from goods manufactured in one state and sold in another or the entire gross income arising from a series of transactions of manufacture and sale in more than one state.

CONCLUSION

In conclusion we submit:

1. The taxes involved in Classes C, D and E are gross income taxes on transactions in interstate commerce, are levied, without apportionment, on the entire gross receipts, lay the way open for double or multiple taxation on the same gross receipts, manifestly cast a burden on interstate commerce, and therefore are in violation of Article I, Section 8, of the Constitution of the United States.
2. The taxes involved in Classes C, D and E, being levied on the entire gross receipts from such sales without attempt by the State of Indiana to limit the tax to the activities carried on within Indiana, violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.
3. This Court's *per curiam* opinion in the *Allied Mills* case gave rise to the confused thinking which vitiates the opinion of the Supreme Court of Indiana in the case at

bar. Because this Court, in that *per curiam* opinion, cited two cases (one involving a tax conditioned solely on a local activity and the other involving a use tax, and neither involving a gross receipts tax) which two cases sustained taxes by the state of the buyer, the Supreme Court of Indiana comes to the conclusion that this Court has now laid down the following rules to govern all cases involving state taxation of gross receipts from interstate commerce, viz.: (a) that the buyer's state can tax; (b) that no other state can tax. The confusion created by these unwarranted assumptions can only be clarified by an opinion of this Court enunciating the true rule. That rule, we submit, is that, in the absence of congressional permission or of state legislative action equitably apportioning the gross receipts between the several states which the transaction touches, no state can constitutionally lay a gross income tax on the gross receipts from interstate commerce. Certainly this is true if, as in the instant case, there exists a real threat of double or multiple taxation on gross receipts from interstate transactions.

Respectfully submitted,

EDWARD R. LEWIS,
JOSEPH J. DANIELS and
PAUL N. ROWE,

Attorneys for Appellants.

APPENDIX A

—Indiana Gross Income Tax (as in effect in 1935 and 1936) Chapter 50, Acts 1933, page 388; Burns Indiana Statutes Annotated, 1933, Section 64-2602.

Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided.

Sec. 3. The tax hereby provided for shall be imposed at the following rates:

. . .

(b) Upon the entire gross income of every person engaged in the business of wholesaling and/or jobbing tangible commodities not specifically mentioned in subsection (d) of this section, one-fourth ($\frac{1}{4}$) of one (1) per cent.

(c) Upon the entire gross income of every person engaged in the business of retailing of any tangible com-

modity or commodities not specifically mentioned in subsection (d) of this section, one (1) per cent.

. . .

Sec. 6. There shall be excepted from the gross income taxable under this act:

(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America. . . .

Section 1b of Illinois Retailers' Occupation Tax, as added by S. B. 512, Laws 1943, effective July 12, 1943. Smith-Hurd, Illinois Stat., Ch. 120, Sec. 440b: a

Sec. 1b. (Person selling tangible personal property at retail.) For the purposes of this Act, a "person" is "engaged in the business of selling tangible personal property at retail in this State" whenever such "person", either himself, or through an employee or employees located in this State or coming into this State for the purpose, or through an agent or agents located in this State or coming into this State for the purpose, or through a representative or representatives located in this State or coming into this State for the purpose, or through an independent person or persons located in this State or coming into this State for the purpose and acting for such "person" (the seller) under a contract of agency, engages habitually, for livelihood or gain, in selling activity in this State, the primary purpose of which selling activity in this State is to promote the "sale at retail" of tangible personal property by such "person", as the phrase "sale at retail" is defined in this

Act. If a "person", or someone authorized to act on his behalf, engages habitually, for livelihood or gain, in selling activity in this State, the primary purpose of which selling activity is to promote the "sale at retail" of tangible personal property of such "person", such "person" is "engaged in the business of selling tangible personal property at retail in this State", notwithstanding the fact that orders for tangible personal property or offers to purchase tangible personal property resulting from such selling activity in this State are not accepted in this State by such "person" or by someone authorized to act on his behalf for this purpose, and notwithstanding the fact that the tangible personal property which is sold as the result of such selling activity in this State is not, at the time of its sale, located in this State, and notwithstanding the fact that the ownership of, or title to, such tangible personal property is not transferred in this State to the purchaser.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

ON APPEAL FROM THE SUPREME COURT OF INDIANA

INTERNATIONAL HARVESTER COMPANY AND
INTERNATIONAL HARVESTER COMPANY OF
AMERICA,

Appellants,

v.

DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. CLIFFORD TOWNSEND, JOSEPH
M. ROBERTSON, AND FRANK G. THOMPSON,
AS MEMBERS OF AND CONSTITUTING THE
BOARD OF DEPARTMENT OF TREASURY,

Appellees.

No. 355

APPELLANTS' REPLY BRIEF

EDWARD R. LEWIS,
JOSEPH J. DANIELS and
PAUL N. ROWE,

Attorneys for Appellants.

SUBJECT INDEX

	<i>Page</i>
No difference between resident and non-resident so far as interstate commerce is concerned.....	1
The issue involved as to all three Classes C, D and E is that of an unconstitutional burden on transactions in interstate commerce.....	4
Discussion of the assertion that "Even interstate business must pay its way".....	5
Discussion and refutation of Appellees' argument respecting Class D sales.....	7
Class C transactions.....	13
Class E transactions.....	20
The tax on Classes C, D and E would deny due process of law under the Fourteenth Amendment.....	22
Conclusion	23

TABLE OF CASES

	<i>Pages</i>
A. G. Spalding Bros. v. Edwards, 262 U. S. 66....	11
Commissioner of Corporations v. Ford Motor Co., 308 Mass. 558, 33 N. E. (2d) 318.....	10
Department of Treasury v. Allied Mills, Inc., 220 Ind. 340, aff'd 318 U. S. 740, 801.....	2
Department of Treasury v. Wood Preserving Corp., 313 U. S. 62.....	8, 9, 10
Gibbons v. Ogden, 9 Wheaton 1.....	13
Graybar Electric Co. v. Curry, 238 Ala. 116, 189 Southern 186, aff'd 308 U. S. 513.....	21
Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434.....	5, 15, 16, 22
Hans Rees' Sons v. North Carolina, 283 U. S. 123	22
J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307....	2, 4, 15, 22
McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33.....	11, 20
Nelson v. Sears, Roebuck and Co., 312 U. S. 359	16
Rearick v. Pennsylvania, 203 U. S. 507.....	2
Sonneborn Bros. v. Cureton, 262 U. S. 506.....	21
Superior Oil Co. v. Mississippi, 280 U. S. 390....	11
Trotwood Trailers, Inc. v. Evatt, 51 N. E. (2d) 645 (Ohio)	10

Treatises

The Federalist, Lodge Election, 1902.....	24
The Records of the Federal Convention of 1787, Max Farrand.....	23, 24
Robert C. Brown, "Some Legal Aspects of State Sales and Use Taxes," 18 Indiana Law Journal 77.....	14

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Appellees' brief is based on the assumption that a different rule applies to the taxation of gross receipts from interstate commerce received by a resident of Indiana, or by an Indiana corporation, from the rule applied to the taxation of gross receipts from interstate commerce received by a non-resident or a foreign corporation.

On page 13 of Appellees' brief, they state: "Since the tax against residents upon their Gross income from

all sources (including interstate commerce) differs materially from the tax against non-residents upon their intrastate activities alone, the cases involving the former (*J. D. Adams Manufacturing Co. v. Storen* (1937), 304 U. S. 307; *Department of Treasury v. Allied Mills* (1942), 220 Ind. 340, aff'd 318 U. S. 740, 801) are inapplicable to the commerce clause questions presented in this case." The meaning of this statement is not clear, but we submit that in any event the decisions of this Court make it abundantly clear that only such gross receipts as arise from Indiana sources are subject to taxation by Indiana when received by a non-resident or by a foreign corporation, and that even such gross receipts are *not* subject to tax if taxing them imposes a burden on interstate commerce.

In other words, we understand that so far as interstate commerce is concerned, this Court has granted the same protection to a foreign corporation as to a domestic corporation, to a non-resident as to a resident.

If the tax as laid is a burden on interstate commerce, it will be held invalid whether the taxpayer is a non-resident or a resident, a foreign corporation or a domestic corporation.

" 'Commerce among the several States' is a practical conception, not drawn from the 'witty diversities' (Yelv., 33) of the law of sales," Mr. Justice Holmes observed in *Rearick v. Pennsylvania*, 203 U. S. 507, 512. The question of what is interstate commerce does not depend on the simple test of where title passed. It does not depend on a nice balancing and weighing of the intrastate activities and the out of state activities, as Appellees seem to imply by their statement on page 13 of their brief that "Indiana does tax businesses conducted in Indiana by non-residents

even though some of the activities incidental to such business are carried on in other states."

In every interstate commerce transaction there must inevitably be some activities carried on in at least two states. It is impossible to carry out an interstate commerce transaction in a vacuum. The question in the case at bar, therefore, is not whether there were some intrastate activities in Indiana in any of the classes of sales here involved, but, always bearing in mind that interstate commerce is a practical conception, whether looking at the transaction as a whole it is one in interstate commerce.

As a general proposition relating to the power of the sovereign to determine whether it will exact revenue from the whole bundle of rights constituting ownership or only from some of the sticks composing the bundle, the statement on page 15 of appellee's brief that "there is no distinction between a tax on property, the sum of all of the rights and powers incident to ownership, and the taxation of the exercise of some of its constituent elements", is of course correct, but the use of the words "In relation to the commerce clause", at the beginning of the statement, does not add anything to the general proposition and serves merely to becloud its meaning. If the commerce clause is not involved, the state may elect to tax the whole bundle of rights or merely some of the sticks composing the bundle. But the commerce clause cuts across the taxing power of the states and inhibits them from laying any tax, whether on the whole bundle of rights or on some of the sticks composing the bundle, if such tax amounts to a burden on interstate transactions. It is true that the limitation laid by the commerce clause comes into play more frequently in cases where a state has attempted to tax only some

of the constituent elements of ownership, and not the entire bundle of rights. That is because the states, in their efforts to avoid the commerce clause, attempt to do so by an indirect route which they hope will seem innocuous rather than by an obvious frontal attack. But the protection afforded by the commerce clause is not affected by the method which the state adopts in its effort to avoid it.

On page 17 of Appellees' brief, to our mind in contradiction with the statements made on page 13 above quoted, it is stated that in the *Adams* case "by agreement of the parties it was understood that interstate commerce was involved, while the contention in this case is not the application of the Gross Income Tax law to interstate commerce, but, first, whether the factual situation indicates that the transactions in question are actually in interstate commerce, or of such a character that a non-discriminatory state tax may be imposed."

In our view this statement on page 17 of Appellees' brief and the statement quoted above from page 13 of their brief are entirely contradictory. The quotation from page 13 states that the *Adams* case is "inapplicable to the commerce clause questions presented in this case", and the quotation from page 17 says that the question involved in this case is not, as in the *Adams* case, the application of the Indiana Gross Income Tax to interstate commerce.

We submit, first, that this Court in the *Adams* case considered solely the question of whether the tax as laid in the *Adams* case was a burden on interstate commerce. We submit, secondly, that in the case at bar Appellant from first to last has asserted that the tax as laid on Classes C, D and E is a burden on interstate commerce in violation of the commerce clause. In our original brief

we cited decisions of this Court to the effect that the transactions involved in Classes C, D and E are transactions in interstate commerce. We contend that unless they are given the protection of the commerce clause, the gross receipts from such transactions are inevitably thrown open to the threat of multiple taxation.

At the top of page 19 of Appellees' brief it is stated: "Because Appellants' business organization assigns territories without regard to state boundaries, they ask to be relieved of all payment for these non-discriminating charges levied with mathematical equality upon intrastate commerce and interstate commerce alike." This comment is made in the discussion of the tax on Class D sales. Obviously it might as well be made as to all three classes.

Evidently Appellees have in mind the statement frequently made that "Even interstate business must pay its way." We submit that this statement means simply that interstate business must pay the ordinary taxes on its property in the taxing jurisdiction, even though that property is wholly used in interstate commerce, and that it must pay local excise or privilege taxes for the privilege of exercising a local activity. It has never been held that interstate business must pay its way by paying without apportionment gross receipts taxes on interstate commerce transactions. Indeed, in the case of *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, this Court said on page 438 that it has been recognized that "even interstate business must pay its way by bearing its share of local tax burdens," but went on to say that it "was enough for present purposes that under the commerce clause, in the absence of Congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax

measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state."

The Record in this case shows that the International Harvester Company throughout the years in question had factories in Indiana at Fort Wayne and Richmond, and branch houses at Fort Wayne, Indianapolis, Evansville and Terre Haute. The Record further shows that in 1938 it established and now owns and operates a factory manufacturing motors at Indianapolis. (R. 25.) It is evident, therefore, that Appellant pays heavy real estate and personal property taxes in Indiana.

Moreover, the Record shows that the International Harvester Company has paid for the years 1935 and 1936 Indiana Gross Income Taxes under the very statute involved in this case, amounting to \$71,262.71, which are in no way involved in this appeal. The amount involved in this appeal is the additional sum of \$4,031.98. (R. 41, 49-51.)*

We submit, therefore, that the International Harvester Company is not asking in this case "to be relieved of all payment for these non-discriminating charges." It is asking only to be relieved of certain Indiana Gross Income Taxes which definitely impose a burden on interstate commerce.

* For 1935 and 1936 the Appellant paid total Indiana Gross Income Taxes of \$86,584.93. The amount for which recovery was asked in the Complaint in the case at bar was \$16,270.07. Of this amount, the Indiana Gross Income Tax Division conceded, or the Indiana Supreme Court held, that the Appellant was not taxable with respect to taxes amounting to \$11,290.24. The Appellant in the Stipulation of Facts withdrew its contentions with respect to taxes amounting to \$947.85. The amount now involved in this appeal is \$4,031.98. The amount of Gross Income Taxes paid by the Appellant and in no way involved in the appeal is therefore \$71,262.71.

Discussion and Refutation of Appellees' Argument Respecting Class D Sales

Appellees state (p. 15, Appellees' brief) that all the activities of the seller, including the manufacture of the goods, occurred in Indiana, except the solicitation of the order, and that all of the activities of the buyer except the acceptance of delivery occurred outside of Indiana. Again they state that "the goods had never been without the State of Indiana, where they were manufactured."

This last assumption is not supported by any evidence in the Record.

Class D sales are sales by branches of the International Harvester Company in Indiana to dealers and consumers residing outside of Indiana, where the buyers came to Indiana and took delivery of the goods themselves. (R. 44.) Delivery in Class D may have been either at the branch in Evansville, Terre Haute or Fort Wayne, the three Indiana branches which have outside territory, or, on direction of those branches, at the factory at Fort Wayne or Richmond. But there is nothing in the Record to the effect that all the goods in Class D were of Indiana manufacture. They may well have been (and though the Record is silent on the subject, many of them inevitably were, since the branches carried a full line of Appellants' products) goods manufactured at the factories of the International Harvester Company in Illinois, Ohio, New York, Wisconsin, Louisiana, or Tennessee, shipped to the branches at Terre Haute, Evansville or Fort Wayne and called for there by the buyers living in Ohio, Kentucky or Illinois.

The situation is that the dealers in the territory of the Terre Haute, Fort Wayne or Evansville branches had

been dealing habitually for years with their branch and that the consumers living in the territory handled by those branches had likewise been dealing habitually for years either directly with the branch or with the dealer who in turn dealt with the branch. The annual contract with the dealer and the retail order contract with the consumer called for shipment from the factory, transfer house or branch house to the buyer. (R. 34, 34A, 38.) It is obvious that the dealer came to the branch at Terre Haute, Fort Wayne or Evansville or went to the factory at Richmond or Fort Wayne and got his goods himself, or the consumer did likewise, either because he would save delivery expense by making his own delivery, or because he would save time by going and getting the goods himself and not waiting for freight or truck delivery from the branch or factory.

The situation, therefore, is very different from that in the case of *Department of Treasury, et al. v. Wood Preserving Corporation*, 313 U. S. 62, on which Appellees so strongly rely.

In the *Wood Preserving* case it appeared that the Wood Preserving Corporation bought railroad ties in Indiana from Indiana producers. The ties were inspected in Indiana by the Baltimore & Ohio Railroad Company, and the Wood Preserving Corporation paid the Indiana producers for the ties accepted by the Baltimore & Ohio Railroad Company. Then bills of lading were made out by the Wood Preserving Corporation as consignor to the Railroad's Chief Engineer of Maintenance of Way at Finney, Ohio, as consignee, and the ties were sent to Finney, Ohio, for treatment at a treating plant which belonged to a subsidiary of the Wood Preserving Corporation.

The right of way of the Baltimore & Ohio Railroad extended through many states, including the state of Indiana. When it purchased the ties in Indiana it could use them any place along its right of way. Moreover, they were unfinished goods which required treatment before they could be used. We submit that the purchase was similar to the purchase of coal or iron ore by a steel company. Iron ore purchased in Minnesota by a steel company may be sent to one of its mills in any one of half a dozen states, or may be retained in the state of purchase, just as the railroad ties in the Wood Preserving case might finally be used on the right of way in Indiana.

In the *Wood Preserving* case, the buyer was a railroad having its tracks and doing business in Indiana; the railroad was an Indiana buyer; Indiana was the buyer's state, the seller's state, and the state where delivery occurred. In the case at bar, in Class D sales, Indiana is *not* the buyer's state and the destination of the goods is not in Indiana.

Again, in the *Wood Preserving* case the transaction between buyer and seller ended with delivery to the buyer. But in the case of our Class D purchases where both the dealer and consumer were dealing with the branch with

which they had dealt for years, there was only one destination at which any dealer of the International Harvester Company had any use for the goods, and there was only one destination at which a consumer in Class D would have any use for the goods. In each case the one destination was the home town of the dealer or consumer outside of Indiana.

Another controlling and vital distinction, we submit, between the *Wood Preserving* case and the case at bar is that there was no showing in the *Wood Preserving* case of a threat of double taxation. The state of the buyer and the seller, and the state of delivery, were one and the same, and there was no showing that any other state could assert a right to tax gross receipts from the transaction.

But in Class D sales the state of the buyer is not Indiana, and in this very case the Indiana Supreme Court has said that this Court has held that the state of the buyer, which in Class D is not Indiana, can tax. In this very case the Indiana Supreme Court has held that the state of delivery, which is Indiana, can tax. Therefore, Class D sales directly raise the question of double taxation of the same gross receipts from an interstate commerce transaction. The *Wood Preserving* case did not raise that question.

The Ohio case of *Trotwood Trailers, Inc. v. Evatt*, 51 N. E. (2nd) 645, cited by Appellees on page 16 of their brief, is we submit directly contrary to the case of *Commissioner of Corporations v. Ford Motor Company*, 308 Mass. 558, 33 N. E. (2nd) 318, cited in our original brief, and is ably answered by the dissenting opinion of Judge Turner in the *Trotwood* case itself.

Appellees also refer to the case of *Superior Oil Company v. Mississippi*, 280 U. S. 390. But in that case, which Mr. Justice Holmes (who spoke for the Court) admitted "is near the line," (p. 395) he said that "there was nothing that in any way committed it [the purchaser] to sending the oil to Louisiana except its own wishes." He added on page 396 that the buyer's "journey to Louisiana was accidental so far as the appellant was concerned."

He also said that a distinction had been taken between sales "made with a view to a certain result and those made simply with the indifferent knowledge that the buyer contemplates that result."

In the case of our Class D sales the purchaser, whether he were a dealer or a consumer, had no use whatever for the goods except in his own home town. Certainly the sale was made "with a view to a certain result," and not, in Mr. Justice Holmes' words, "with the indifferent knowledge that the buyer contemplates that result." (p. 395.) The buyer's journey, to quote Justice Holmes again, was not "accidental" so far as International Harvester Company was concerned. Applying the words of the decision in *McGoldrick v. Berwind-White Coal Mining Company*, *supra*, the merchandise in Class D had not been "brought to its journey's end," (p. 49) as it had in the Berwind-White case. To adopt the language of this Court in *A. G. Spalding Bros. v. Edwards*, 262 U. S. 66, 70, there was not "the slightest probability of any such change and it did not occur," namely, a change in the intention of the buyer to remove the goods from the state.

It is submitted that a retail dealer, having an established place of business in a certain town, would not arbitrarily take the goods to another town, and obviously a consumer

has only one place to take the goods, and that is his own home town.

Moreover, the Record (R. 34) shows that 67.6% of the sales involved in this case were on conditional sale contracts, and it is manifest that a purchaser under a conditional sale contract cannot remove the goods from jurisdiction to jurisdiction at his own pleasure.

We have shown that the State of Illinois has already asserted an intention to tax, under the Illinois Retailers Occupation Tax, the very same sales as were made in Class D. In other words, Illinois asserts that if a seller with an office in Indiana habitually sends sales representatives to Illinois to solicit sales, that seller is a person engaged in the business of a retailer in Illinois and a sale by that seller to the Illinois buyer will be subject to the Illinois Retailers Occupation Tax, even though the purchaser gets delivery of the goods himself in Indiana and brings them to Illinois.

Appellees state in their brief that we have shown only one concrete example of such a possibility of multiple taxation (page 18, Appellees' brief). It may safely be predicted, however, in view of the well-known imitative tendencies of legislatures in the United States, that if this Court should hold that the Indiana Gross Income Tax can be applied to Class D transactions without clearly prohibiting taxation by the state of the buyer on the same gross receipts, there will very likely be 47 states in a few years which will be asserting the same right that Illinois is already asserting.

Appellees state (p. 18) that the Indiana Gross Income Tax "certainly" will "increase their cost of doing business" but that this is no more than a property tax would

do. Appellant does not object to the increased cost of doing business resulting from the imposition of state taxes on its property, nor from state taxes on its intrastate activities. We have already shown the heavy Indiana Gross Income Taxes which Appellant has paid and which are not involved in this appeal, and most of which were paid without any protest or contest. It is the threat of a multiple tax burden which we protest against, and which is the central issue of this appeal. In Class D, where the buyer gets delivery of his goods in Indiana for the purpose of transporting them to his home in Ohio, Kentucky or Illinois, and does so transport them, Indiana, the state of delivery, has already asserted the right to tax the entire gross receipts. But on the reason given for the decision, the state of the buyer, Ohio, Kentucky or Illinois, can also tax the same entire gross receipts. Class D transactions, therefore, involve the transportation of goods in interstate commerce, and the result of the decision of the Indiana Supreme Court is definitely to raise the threat of multiple taxation.

Class C Transactions

The Appellees contend that in Class C the "only possible interstate or extrastate activity was the formation of the executory contract of sale."

But we have shown that there was continuous intercourse across state lines in order to effect Class C sales, and interstate intercourse ever since *Gibbons v. Ogden*, 9 Wheaton 1, has been held to be interstate commerce.

In the beginning of each Class C sale, the branch at Cincinnati, Louisville or Kankakee receives an order from a buyer in Indiana. The order may either be sent by mail

from the buyer in Indiana to the branch outside, or the order may have been received by a salesman of the International Harvester Company in Indiana and brought by him to the office in Cincinnati, Louisville or Kankakee. The branch manager at Cincinnati, Louisville or Kankakee accepts the order. The branch receives word from the buyer in Indiana that he will take delivery of his own truck at Fort Wayne or his own seeding machine at Richmond. The branch at Cincinnati, Louisville or Kankakee thereupon directs the factory at Fort Wayne or the factory at Richmond to deliver the truck or seeding machine to the buyer in Indiana. The buyer in Indiana pays cash or gives notes or both to the branch at Cincinnati, Louisville or Kankakee. The notes are held by the branch at Cincinnati, Louisville or Kankakee and the principal and interest on the notes are collected there when due. To complete each sale, therefore, and receive the proceeds, there has been repeated activity across state lines.

The Appellees object that the cases cited by us on page 31 of Appellants' brief evidence a development of law "peculiar to that field and are not to be extended beyond the field." (Appellees' brief p. 20.) This statement recalls an observation by Professor Robert C. Brown of Indiana University Law School in an article in Vol. 18 Indiana Law Journal, pp. 77, 82, entitled "Some Legal Aspects of State Sales and Use Taxes," to the effect that "We seem to be approaching, if we have not already reached, that paradise where everything is interstate commerce for purposes of federal regulation (especially labor regulation) and nothing is interstate commerce so far as state taxing power is concerned." We believe that the cases cited on page 31 of our original brief are clearly to the effect that the transmission of telegraph, telephone

and radio messages are transactions in interstate commerce. If they are transactions in interstate commerce, then we see no reason why the transactions in Class C are not transactions in interstate commerce, and consequently we see no reason why the ordinary principles of taxation governing transactions in interstate commerce should not apply.

Certainly, it would seem clear that unless the Class C transaction is given the protection of the Commerce Clause, the way is open in Class C for both the state where the goods are delivered, Indiana, and the state where the contract is made, and the sales proceeds received, Kentucky, Ohio or Illinois, to tax the entire gross receipts without apportionment.

The Indiana Supreme Court has held in this case in Class C sales that Indiana, which is the state of delivery to the buyer and at the same time the state where the buyer lives, can tax the gross receipts. But if, for example, the sale is one made by the Cincinnati branch to a buyer in southeastern Indiana, there is no reason, save for the protection afforded by the commerce clause, why Ohio, the state where the contract is approved and where the sales proceeds are received, cannot also tax the entire gross receipts.

Indeed, the dissenting opinion in the *Adams* case argues that the "receipt of income is a taxable event" (*J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, 330), and the whole basis of the dissent in *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, is that the receipt of income can be taxed by the state in which it is received. In that case the sales were made outside the State of Washington, the goods were delivered to the buyers outside the State

of Washington, the buyers were located outside the State of Washington, but the sales proceeds were received by Gwin, White & Prince, Inc., in the State of Washington. The dissenting opinion contended that the State of Washington should be permitted to tax the gross receipts received in that State.

This is exactly the same situation which would arise if the State of Ohio, in the example given above, should attempt to tax the gross receipts from a Class C sale. Double taxation of the same gross receipts in Class C can be prevented only if the transaction is recognized for what it is, a transaction in interstate commerce.

Appellees assert that the sole cause of the extrastate element in Class C sales was "the Appellants' departmentalization of its business whereby certain Indiana counties were assigned to out of state branches. Cf. *Nelson v. Sears, Roebuck and Co.* (1941), 312 U. S. 359." (Appellees' Brief, p. 20.)

We are not sure we understand what Appellees mean when they speak of "the Appellants' departmentalization of its business." They admit that what they call "departmentalization" was "based on sound economic factors and was not for the purpose of tax evasion." (Appellees' Brief, p. 20.)

In *Nelson v. Sears, Roebuck and Co.*, *supra*, the Court stated (p. 364) that the mail orders from a buyer in Iowa sent to Sears Roebuck's Chicago office were still a part of Sears Roebuck's Iowa business and Sears Roebuck "can not avoid that burden [namely the burden of collecting the use tax] though its business is departmentalized. What-
ever may be the inspiration for these mail orders, however

they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa." It will be noted that no tax was imposed on Sears Roebuck on these mail order sales completed by shipment in interstate commerce to the retail buyers in Iowa. Sears, Roebuck and Co. was merely made the collection agency of the State of Iowa for the Iowa Use Tax on the consumer buying the goods. But in imposing even that duty the Court stressed the point that Sears, Roebuck had retail stores in Iowa selling to consumers in the same town or district in which the mail order purchasers also lived. In other words, Sears, Roebuck and Co. made retail sales by mail order to Iowa consumers who lived in the same territory that was handled by the local retail stores in Iowa. One consumer in a town would go to a retail store and another consumer in that same town would send a mail order to Chicago. A Sears Roebuck Iowa store was as available to serve the mail order customers as it was to serve those who bought at the store. This was a unitary business and the Court held only that there was no invalid burden on interstate commerce in requiring the seller to collect the use tax owing by the buyer on mail order purchases.

But in Class C the Record shows that International Harvester Company had no wholesale sales outlets whatever in Indiana for handling the territory actually handled by the Cincinnati, Kankakee and Louisville branches. All the wholesale business with purchasers in Indiana, (namely dealers in the territory of the Louisville, Cincinnati and Kankakee branches), was handled by those branches and those branches only. In other words, a purchaser at wholesale in the territory of the Cincinnati branch, for example, did not have a choice between purchasing from the branch

at Cincinnati, or from a branch of the Appellant in Indiana. He could buy only from the Cincinnati branch. (R. 30, 31.)

The Record also shows that the International Harvester Company had only one retail sales outlet under its own management in the entire territory handled by the Louisville, Cincinnati and Kankakee branches, namely, a McCormick-Deering Store at Seymour, Indiana, under the jurisdiction of the Louisville branch, handling the territory in the vicinity of Seymour. (R. 30.) All the other retail business in the territory of the Cincinnati, Louisville and Kankakee branches was handled on orders accepted by those branches, except those retail sales made by independent dealers, which are not involved in Class C sales.

Therefore, there is no question of "departmentalizing" the business so far as Class C sales are concerned. There is merely involved the question of the division of the territory handled by the Company's branches. In other words, there is no departmentalization of business involved in the sales by a branch in one state to a buyer in another state.

Appellees frankly agree that Appellants have not arbitrarily divided the territory handled by their branches. (Appellees' Brief, p. 20.) We believe we have already sufficiently shown that Appellant has not established the trade areas in which its branches operate, but that the trade has made the areas and not the areas the trade.

We have referred in our original brief to the striking testimony of J. L. McCaffrey, Vice President in Charge of Sales of the International Harvester Company, on this point.

We submit, moreover, as we did in our brief opposing Appellees' motion to dismiss this appeal, that it is incon-

sistent for Appellees to argue that Appellants have departmentalized their business in Class C sales when the buyers live in Indiana and not to recognize that the same argument would deny the right to tax Class D sales. In Class D sales the buyer lives outside Indiana and the branch which made the sale is inside Indiana. In Class C sales the buyer is in Indiana and the branch which made the sale is outside Indiana. If it is "departmentalizing" the business in Class C for a branch located outside Indiana to sell to a buyer in Indiana, then it is "departmentalizing" the business in Class D for a branch located in Indiana to make a sale to a buyer located in Ohio, Kentucky or Illinois.

Therefore, the very argument of Appellees that Indiana has a right to tax Class C sales would deny the right of Indiana to collect a tax on Class D sales.

In Class C then, as in Class D, there was a prior contract between the Appellant and the buyer calling for shipment of the purchased article from the factory, branch or transfer warehouse to the buyer. 50% of the sales in Class C in 1935 and 66% in 1936 were wholesale sales, namely sales to dealers operating under annual contracts with the Appellant. (R. 44.) Neither the purchaser at wholesale (the dealer) nor the consumer were casual purchasers. They lived in the territory of the branch making the sale and dealt habitually across state lines with those outside branches. The sales in question were effected by a steady intercourse across state lines. The transactions were in interstate commerce and, as we have shown, if they are not recognized as such and given the protection of the commerce clause, multiple taxation cannot be avoided. If Indiana, the state of delivery of the goods, can tax the entire gross receipts without apportionment, the way is

open for Ohio, Kentucky or Illinois, as the case may be, the state where the contract is approved and the sales proceeds received, also to tax the receipt of the income, the same entire gross receipts, without apportionment.

Class E Sales

The Appellees argue that the contention advanced by the Appellants on this appeal as to Class E sales was examined at length by this Court in *McGoldrick v. Berwind-White Coal Mining Company*, 309 U. S. 33, and was specifically rejected. But in *McGoldrick v. Berwind-White Coal Mining Company*, *supra*, the Court particularly called attention (p. 43) to the fact that, "Purchases for resale are exempt from the tax and a purchaser who pays the tax and later resells is entitled to a refund." In other words, the tax involved in the *Berwind-White* case was a tax on the buyer at retail (i.e., in effect a use tax), a completely different imposition from the tax involved in the case at bar. It was for this reason, we submit, that the Court in the *Berwind-White* case said (page 58) that "The rationale of the Adams Manufacturing Company case does not call for condemnation of the present tax. Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption."

In our original brief we referred to the ample evidence in the Record that the shipments in Class E were made from outside Indiana to buyers in Indiana, either because the freight was cheaper that way, or because the branch in Indiana did not have the goods on hand when shipment was required, or for both reasons. (R. 33, 62-63, 77, Plaintiffs' Exhibit 5, R. 84, 97.)

John L. McCaffrey, Vice President of International Harvester Company in Charge of Sales, testified that if there were 100 kinds of machines used in a certain territory, the Branch "might have a sample of each of the machines," but "not nearly enough to supply the total demand of that territory." (R. 77.) Appellees in their brief frankly state (p. 21 of Appellees' Brief) that Class E sales "arose when orders were in large amounts of goods which could not economically be carried in stock and where a cheaper freight rate could be obtained by a direct shipment."

The sales in Class E, we submit, were not in all respects, as Appellees say, similar to those in *Graybar Electric Co. v. Curry*, 238 Ala. 116, 189 So. 186, affirmed in 308 U. S. 513. The sales in the *Graybar* case were all at retail. Of the sales in Class E involved in this case, the tax on retail sales in 1935 is only \$16.13. The tax on wholesale sales in 1935 remaining in contest is \$58.56. In 1936 there is no retail tax involved, the wholesale tax remaining in controversy being \$29.72. (R. 46.) In the *Graybar* case, moreover, the Alabama statute required that the retail merchant collect the tax from the buyer. The Indiana Gross Income Tax is a tax on the seller. Finally, in three classes of sales in the *Graybar* case there was no requirement in the contract that shipment should come from outside Alabama, and as to the fourth class, Class A, the Court said that "Evidently this provision as to 'interstate movement' was to preclude, if possible, the imposition of a sales tax on the goods in Alabama." (*Graybar Electric Co. v. Curry*, 189 So. 186, 190.)

We submit that the rule in *Sonneborn Bros. v. Cureton*, 262 U. S. 506, applies to Class E sales in this case. The contract or order of sale called for interstate shipment, the

shipment was so made, either because the goods were not on hand at the Indiana branch or because the freight was cheaper if shipped from the factory or transfer house outside the state direct to the consumer in Indiana, the sales were chiefly wholesale sales to dealers, and finally if Indiana can tax the entire gross receipts in Class E the way is certainly open to the state of manufacture of the goods, which is outside Indiana, also to tax the entire gross receipts without apportionment.

The Tax on Classes C, D and E would Deny Due Process of Law Under the Fourteenth Amendment

Appellees in their brief state that the tax is measured "by the volume of such activities as expressed in the gross receipts arising from them within the state," and therefore does not violate the due process clause. But the tax is laid on the entire gross proceeds without apportionment, and those proceeds resulted from all the activities of the taxpayer in producing the gross income.

In *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, and *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, this Court held the tax bad because, as stated in the latter case, it was not "apportioned to its [the taxpayer's] activities within the state" (*Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 439). If the tax is not apportioned to the activities within the state, it follows necessarily that it taxes business and property outside of the State and therefore violates the due process clause. *Hans Rees Sons v. North Carolina*, 283 U. S. 123.

CONCLUSION

It has been frequently remarked that one of the chief reasons for the splendid commercial development of the United States is that there has been absolute freedom of trade between the States. One of the dominating purposes of the Federal Constitutional Convention was to prevent the restrictions which the States at that time were imposing on interstate trade. Hamilton, Madison and Washington, among others, were greatly distressed by the jealousies of the various States and their selfishness. The States at that time did not operate by taxes imposed on trade between the States, but they operated by actual tariff duties. Madison wrote near the end of his life in his "Preface to Debates in the Convention of 1787" that "the States having ports for foreign commerce, taxed & irritated the adjoining States, trading thro them, as N.Y. Pena. Virga. & S-Carolina. Some of the States, as Connecticut, taxed imports as from Massts. higher than imports even from G.B. of wch. Massts. complained to Virga. and doubtless to other States (see letter of J.M.). In sundry instances, of as N.Y. N.J. Pa. & Maryd. (see) the navigation laws treated the Citizens of other States as aliens." Farrand's "The Records of the Federal Convention of 1787," Vol. III, p. 548.

George Washington wrote in a letter to David Stuart, July 1, 1787:

"Persuaded I am that the primary cause of all our disorders lies in the different State Governments, and in the tenacity of that power which pervades the whole of their systems. Whilst independent sovereignty is so ardently contended for, whilst the local views of each State and separate

interests by which they are too much govern'd will not yield to a more enlarged scale of politicks; incompatibility in the laws of different States, and disrespect to those of the general government must render the situation of this great Country weak, inefficient, and disgraceful. It has already done so,—almost to the final dissolution of it—weak at home and disregarded abroad is our present condition, and contemptible enough it is."

Farrand's Records of the Federal Convention of 1787. Vol. III, p. 51.

Hamilton in the Federalist, No. XI, page 65, Lodge Edition, declared that "An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions not only for the supply of reciprocal wants at home, but for exportation to foreign markets."

It is surely as much a restraint on trade between the States to impose multiple gross receipts taxes on the proceeds of interstate commerce as to impose tariff duties on the passage of goods from State to State. The Appellants do not ask that no gross receipts taxes on proceeds from interstate commerce be imposed. But they do say that, unless the State statute restricts the tax to the proportion of the gross receipts arising from the activities of the taxpayer within the State, or unless Congress lays down the standards under which taxation of gross receipts from interstate commerce may be imposed, such taxation is forbidden by the commerce clause.

Such a result would not give the Appellant any tax or other competitive advantage over intrastate business. Plaintiffs' Exhibit 2 (R. 71, 94) and Exhibit 3 (R. 73, 95)

show that, broadly speaking, where the Appellant operates in interstate commerce in Indiana, other businesses operate in interstate commerce. On the Traffic World Map (Exhibit 2) and the Department of Commerce Map (Exhibit 3) as on the International Harvester branch house map (Exhibit 1, R. 90, 93), Cincinnati is the center of a trade area extending into Ohio, Kentucky and Indiana. Evansville is the center of a trade area on all three maps, covering parts of Indiana, Illinois and Kentucky. Louisville is the center of a trade area on all three maps, including territory in Indiana and Kentucky. Parts of east central Illinois and west central Indiana are in the same trade area on all three maps.

In short, where the Appellant does an interstate business, other businesses do an interstate business and receive the same protection. Where the Appellant does an intrastate business, other taxpayers do an intrastate business, and have the same burdens and protection. Practically every taxpayer doing a wholesale business would make both interstate and intrastate sales. It is altogether illusory to think that an interstate business would be given an advantage over an intrastate business.

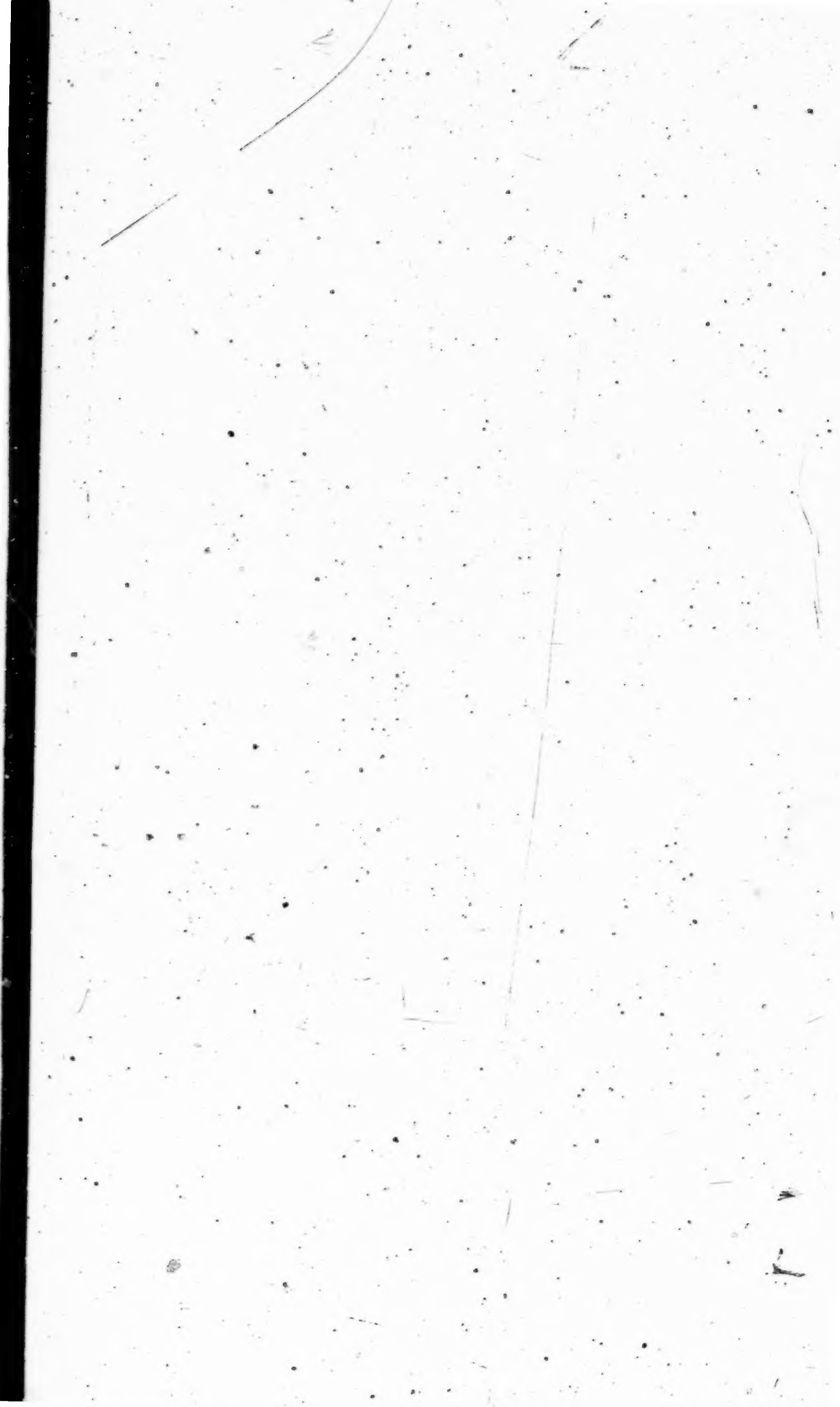
On the other hand, if the transactions in Classes C and D are subjected to the Indiana gross income tax, the Appellant may well actually be put at a competitive disadvantage. A competitor with Indiana branches selling to purchasers in the Class D territory in Ohio, Kentucky and Illinois who shipped the goods by rail to the buyer in Ohio, Kentucky or Illinois would be exempt from the Indiana tax under the decision in the *Adams* case. A competitor with branches in Ohio, Kentucky or Illinois who shipped the goods by rail to buyers in Indiana in the Class C ter-

ritory would be exempt from the Indiana gross income tax under the decision of the Indiana Supreme Court as respects Class A sales in this case. It follows that if the decision of the Indiana Supreme Court here on appeal is affirmed, Appellant will be laid open not only to the danger of multiple taxation on transactions in Classes C, D and E but will also be laid open to taxes in Classes D and C where its competitors shipping by common carrier will not be subject to tax at all.

Respectfully submitted,

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FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 355

**INTERNATIONAL HARVESTER COMPANY AND
INTERNATIONAL HARVESTER COMPANY OF
AMERICA,**

Appellants,

vs.

**DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERT-
SON, AND FRANK G. THOMPSON, AS MEMBERS OF AND CON-
STITUTING THE BOARD OF DEPARTMENT OF TREASURY.**

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA.

**STATEMENT OF MATTERS AND GROUNDS MAKING
AGAINST THE JURISDICTION OF THIS COURT
AND MOTION TO DISMISS OR AFFIRM.**

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TABLE OF CONTENTS

	Page
I. The Record fails to show that the validity of any state statute on the ground of its being repugnant to the Constitution of the United States was decided in favor of such validity by the Supreme Court of Indiana.....	1
II. The Record does not present for decision any substantial Federal question.....	2
A. Appellants' contentions are foreclosed by previous decision of this court applying the Indiana Gross Income Tax to similar transactions.....	2
B. Appellants' contentions are foreclosed by previous decisions of this court with reference to Sales, Use and other taxes.....	6
C. Previous decisions by this Court have held the distinctions proposed by appellants between the case at bar and the above cases to be invalid and not controlling.....	9
1. That the sale was negotiated by appellants' out-of-state employers is immaterial.....	9
2. That the buyer's intent to transport the goods out of Indiana after delivery is immaterial.....	9
3. That the goods in Class E were delivered in Indiana by shipment from another state is immaterial.....	10
4. The mere possibility that a use tax might be levied by another state on Class D sales is immaterial.....	11
Summary and Conclusion.....	11

TABLE OF CASES CITED

<i>Adams (J. D.) Co. v. Storen</i> , (1938) 304 U. S. 307.....	3, 12
<i>Allied Mills v. Department of Treasury</i> (1942) 63 Sup. Ct. 666.....	4, 12
<i>Allied Mills v. Department of Treasury</i> , 42 N. E. (2d) 34.....	4

	Page
<i>Bacon (J.) & Sons v. Martin</i> , (1939), 305 U. S. 380.....	13
<i>City of New York v. Feiring, Tr.</i> (1941), 313 U. S. 283.....	6
<i>Dept. of Treasury of Ind. v. Wood Preserving Co.</i> (1941), 313 U. S. 62.....	3, 9, 12
<i>Felt & Tarrant Mfg. Co. v. Gallagher</i> , 306 U. S. 62.....	4, 8
<i>Henneford v. Silas Mason Co.</i> , 300 U. S. 577.....	11
<i>McGoldrick v. Berwind-White Coal Mining Co.</i> (1940) 309 U. S. 33.....	7, 8, 10, 12
<i>McGoldrick v. Compagnie Generale Transallantique</i> (1940) 309 U. S. 430.....	8
<i>McGoldrick v. Felt & Tarrant Co.</i> , 309 U. S. 70.....	4, 8
<i>McGoldrick v. Gulf Oil Corp.</i> (1940) 309 U. S. 414.....	7
<i>Montgomery, Ward and Co.</i> , (1941) 312 U. S. 373.....	9
<i>Nelson v. Sears, Roebuck and Co.</i> (1941) 312 U. S. 359.....	9, 12
<i>Sonneborn Bros. v. Cureton</i> , (1922) 262 U. S. 506.....	10
<i>Southern Pacific Co. v. Gallagher</i> (1939) 306 U. S. 167.....	8, 11
<i>Superior Oil Co. v. Mississippi</i> , 280 U. S. 390.....	10, 12
<i>U. S. v. Sutherland</i> , (1935) 9 Fed. Supp. 204.....	10
<i>Wisconsin v. J. C. Penney Co.</i> (1940) 311 U. S. 435.....	7

TABLE OF STATUTES CITED

U. S. Statutes:

Section 237 of the Judicial Code (28 U. S. C. #344)..... 2

Indiana Statutes:

Section 6 of the Indiana Gross Income Tax Act
of 1933.....

SUPREME COURT OF THE UNITED STATES

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA.

**STATEMENT OF MATTERS AND GROUNDS MAKING
AGAINST THE JURISDICTION OF THIS COURT.**

**The Record Fails to Show That the Validity of Any State
Statute On the Ground of Its Being Repugnant to the
Constitution of the United States Was Decided in Favor
of Such Validity by the Supreme Court of Indiana.**

As stated in appellants' "Statement as to Jurisdiction"
(p. 3) the Indiana Gross Income Tax Act, here involved, con-
tains as section 6, a specific exemption of

“So much of such gross income as is derived from business conducted in ~~commerce between this state and other states~~ * * * to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States * * *.”

This exemption is co-extensive with the constitutional prohibition. If the taxing authorities and the State Supreme Court erroneously transgressed the bounds of the State's taxing power, they did so without statutory authority. It is an unconstitutional application of the laws that is complained of, not an invalidity of the statute itself.

In such cases section 237 (a) of the Judicial Code (28 U. S. C. 344 a) under which appellants here proceed is not the proper remedy for correction of the error of the Supreme Court of Indiana by this Court. Such section 237 (a) grants the right of appeal only,

“ * * * where is drawn in question the *validity* of a statute of any state, on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity, * * *.”

Since the applicability and not the validity of the Indiana Statute is involved, the papers whereon this appeal was allowed should be regarded and acted upon, if considered at all, as an application to this Court for a writ of certiorari to the Supreme Court of Indiana, as provided in Section 237 (c) of the Judicial Code (28 U. S. C., 344 c).

II.

The Record Does Not Present for Decision Any Substantial Federal Question.

A.

Appellants' Contentions Are Foreclosed by Previous Decisions of this Court Applying the Indiana Gross Income Tax to Similar Transactions.

The application of the Indiana Gross Income Tax to transactions with direct or incidental interstate elements has been before this Court on several different occasions in recent years.

The case of *J. D. Adams Mfg. Co. v. Storen* (1938) 304 U. S. 307, 82 L. Ed. 1365, 58 S. Ct. 913, concerned sales by an Indiana manufacturer where the contract of sale was made subject to approval of the home office of the appellant, but the sale itself was consummated by shipment to the purchaser in another state. This Court held the receipts from such sales to be exempt from tax by virtue of the commerce clause of the Constitution of the United States. Appellants quote from this case at length in their statement as to Jurisdiction and rely heavily upon it.

In *Department of Treasury of Indiana v. Wood Preserving Co.* (1941, 313 U. S. 62, 85 L. Ed. 1188, 61 S. Ct. 885, the sales in question were made by appellee, a foreign corporation, pursuant to a contract of sale negotiated and entered into in Pennsylvania. The sales themselves were consummated in Indiana by delivery to the purchaser who immediately and by previous arrangement and intent, shipped the goods out of the State for processing.

In principle the facts of that case are identical with the facts in the Class D sales in the case at bar. In each the seller was a foreign corporation; the contract of sale was negotiated and entered into at an office of the seller out of the State of Indiana; but the sale itself was consummated by delivery within the state; and the purchaser immediately and pursuant to pre-arrangement transported the goods out of the State and the sale price was paid in another state.

This Court held such sales to be taxable as against contentions similar to those advanced by the appellants herein to the effect that such tax was prohibited entirely by the commerce clause and was invalid under the Fourteenth

Amendment for want of apportionment. This Court expressly distinguished *Adams Manufacturing Co. v. Storen*, *supra*, upon the ground that in the *Wood Preserving Case* (as here) the seller and the buyer were both present in Indiana and the actual sale was made as an intra-state transaction in Indiana. This Court further held that neither the fact that the prior orders were received by the seller out of the state nor the fact that the purchase price was paid outside of the state affected the fact that the sale was in essence an intra-state sale taxable as an activity of the seller within the state, without apportionment. The court held the tax to be validly assessed against an activity within the state.

In *Allied Mills v. Dept. of Treasury* (1942), — U. S. —, — L. Ed. —, 63 S. Ct. 666, this Court *per curiam* affirmed the judgment of the Supreme Court of Indiana (— Ind. —, 42 N. E. (2d) 34). The opinion of the Indiana Supreme Court shows that the sales there involved, like the sales in Class E. herein, arose from orders taken in Indiana and consummated by delivery from another state into Indiana. That court held that *Adams Manufacturing Co. v. Storen*, *supra*, and like cases precluded the taxation of such transactions by other states and, consequently, the problem of multiple taxation was not involved. It further held that the State where the sale was consummated by delivery to the buyer could tax.

This Court affirmed *per curiam* on authority of *McGoldrick v. Felt & Tarrant Mfg. Co.*, 309 U. S. 70, 60 S. Ct. 404, 84 L. Ed. 584 and *Felt & Tarrant Co. v. Gallagher*, 306 U. S. 62, 59 S. Ct. 376, 83 L. Ed. 488. In the former case the basis of the court's decision sustaining the tax is revealed in the statement,

“ . . . the tax was imposed on all sales of merchandise for which orders were taken within the city

and possession of which was transferred to the purchaser there."

In the latter case the court rested its decision upon the fact that by the sale the property sold became a part of the common mass of property within the state and lost its interstate character.

The logical construction to be placed, then, upon *Allied Mills v. Department of Treasury, supra*, is that where possession of the article sold is transferred to the purchaser within the state so that by such delivery the property sold becomes a part of the general mass of property within the state, such sale is taxable by the state and the technicality as to whether the tax is a sales or use tax levied upon the buyer or a gross receipts tax levied upon the seller is not determinative.

The conclusion from these three cases on the Indiana Gross Income Tax, that the state where the sale is consummated by delivery may tax and that such delivery is the taxable event, not only harmonizes these three decisions, but leads to a logical and practical solution of the problem. Commercially, goods are not in competition in the state where the contract of sale is made, but rather in the state where they are delivered. Until delivery is made or tendered the sale is inchoate.

This rule, as shown by its application in *Adams Manufacturing Co. v. Storen, supra*, is adequate protection against multiple taxation of this transaction by different states. True, if the purchaser presently or in the future transports the goods to some other state for use, such use might under some circumstances be taxed by the state where used. But this is not a tax on the same activity and, if possibility of a future use tax be held to be a bar to taxation in the state of sale, state taxation of sales could be greatly embarrassed. Many instances can be found in the case of durable

goods, or even non-durable goods, where it cannot with certainty be said that these goods will not be used in some other state having a use tax. Even shoppers at retail stores could claim to be residents of other states in order to gain exemption of tax: Effective audit and enforcement would be almost impossible. The path would be opened to wholesale evasion. Such chaos is not socially desirable when the state of delivery rule is logical, practical, and constitutionally available.

The taxable event in each of the classes in the case at bar is the sale consummated by delivery to the purchaser in the State of Indiana. Under the rule established by the above cases in particular reference to the Indiana Gross Income Tax, such a taxable event is wholly intra-state and each of appellants' assignments of error is foreclosed by the decisions of this Court in those cases.

B.

Appellants' Contentions are Foreclosed by Previous Decisions of this Court with reference to Sales, Use, and other Taxes.

Appellants seek to avoid the effect of the decisions of this Court concerning sales taxes on goods imported for the purpose of sale by drawing a distinction between such sales taxes and the Indiana Gross Income Tax. The distinction which they attempt is that the sales tax is levied against the buyer while the Indiana Gross Income Tax is levied against the seller. In *City of New York v. Feiring, Tr.* (1941), 313 U. S. 283, 85 L. Ed. 1323, 61 S. Ct. 1028, this Court discussed such a claim in connection with priority rights of a claim for sales tax in bankruptcy and held that, since both the seller and buyer were equally liable for an unpaid tax, it is a tax upon both. The specific point was

that it was a tax upon the seller and was entitled to priority in his bankruptcy.

The claim of distinction is unsound also because it does not recognize that the determination of this question does not depend upon legal niceties. As stated in *Wisconsin v. J. C. Penney Co.* (1940), 311 U. S. 435, 85 L. Ed. 267, 61 S. Ct. 246:

"The Constitution is not a formulary. It does not demand of States strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society."

Where sales are consummated by delivery within the state, rights, privileges, duties and obligations arise and become fixed by the laws of that state. The property sold enters the general mass of property within that state and is equally protected by its laws. This, not the technical incidence of the tax is the true test.

A rule may sometimes be best illustrated by its exceptions. In *McGoldrick v. Gulf Oil Corp.* (1940), 309 U. S. 414, 84 L. Ed. 840, 60 S. Ct. 664, an act of Congress permitted delivery of "Bonded" oil only for the specific purpose of export and specifically prevented the oil from becoming a part of the general mass of property within the State. This Court held the transaction exempt from the tax. On the other hand *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, 84 L. Ed. 565, 60 S. Ct. 388, held

that essentially similar sales not so bonded and not withheld from the general mass of property within the state were taxable. In each of these cases fuel was delivered from another state directly into the bunkers of ships located at docks in New York. This Court stressed heavily in its opinion in the former case that the Federal Acts prevented the property from becoming part of the general mass of property within the state and that, therefore, the *Berwind-White* case did not apply. The companion case of *McGoldrick v. Compagnie General Transatlantique* (1940), 309 U. S. 430, 84 L. Ed. 849, 60 S. Ct. 670, clearly indicates this distinction in that there the taxpayer, on facts identical with *McGoldrick v. Gulf Oil Corp.*, *supra*, presented only the question of interstate commerce and this Court held that in the absence of a contention that the Federal act had withdrawn the property from the general mass of goods within the state, the *Berwind-White* case would apply.

The decisions of this Court have firmly established the rule that the state where a sale is consummated by unconditional delivery to the buyer may tax that sale. *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, "Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption"; *Southern Pacific Co. v. Gallagher*, (1939), 306 U. S. 167, "We think there was a taxable moment when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation." Cf. *McGoldrick v. Felt & Tarrant Mfg. Co.* (1940), 309 U. S. 70; *Felt & Tarrant Mfg. Co. v. Gallagher* (1939), 306 U. S. 62.

In each of the three classes of sales here involved unconditional delivery was made to the buyer in Indiana. This was essentially an intra-state transaction taxable by Indiana as such.

C.

Previous Decisions by this Court Have Held the Distinctions Proposed by Appellants between the Case at Bar and the Above Cases to be Invalid and Not Controlling.

1.

Appellants propose the distinction that in the case at bar their agents within the state who made delivery had no right to and did not negotiate the contract of sale.

This is entirely a matter of intra-corporate organization and departmentalization. Appellants cannot avoid its tax burden by departmentalizing its business. *Nelson v. Sears-Roebuck & Co.* (1941), 312 U. S. 359; *Nelson v. Montgomery Ward & Co.* (1941), 312 U. S. 373. It is enough that some of their employees were in Indiana representing it in the course of business which it is conducting. *Nelson v. Montgomery-Ward & Co.*, *supra*; *Department of Treasury v. Wood Preserving Co.* (1941), 313 U. S. 62.

It will be noted that the only extra-state element present in Class C. sales herein was the fact that *due to the departmentalization of appellants' business* the orders were sent by appellants' solicitors to their out-of-state branches, but appellants took the orders and made delivery in Indiana. Thus, the above cases preclude appellants from using such departmentalization as a basis for escaping tax.

2.

We have already pointed out the controlling effect of *Department of Treasury v. Wood Preserving Co.* (1941), 313 U. S. 62, against appellants' contention that the buyer's intent to transport the goods in Class D out of the state distinguished this class from the general rule. (*See II. B supra.*) This Court has on other occasions denied the

validity of this contention. In *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, the fuel involved was loaded in the bunkers of ships for transportation to and consumption on the high seas. In *Superior Oil Co. v. Mississippi* (—), 280 U. S. 390, oil was sold for use in another state. In each instance this Court held that the buyer's intended use of the goods sold was inconclusive. In *U. S. v. Sutherland* (1935), 9 Fed. Supp. 204, at p. 207, the Court aptly said:

"When a lumber merchant or any other type of merchant or one not a merchant sells a thing in the State of Missouri to a resident of Missouri, that transaction certainly is altogether intrastate. If the person to whom he sells is a resident of Iowa and will take the thing purchased to Iowa, the transaction between the vendor and vendee still is altogether intrastate. The transaction is completed when the sale is made. What the purchaser does with the thing bought certainly cannot affect the nature of the transaction between him and the seller. The purchaser, indeed, is engaged in interstate commerce if he transports the thing bought to another State, but the seller is not. *It is impossible to elaborate a truth so simple.*"

That the buyer intended to transport the goods purchased into another State; that the buyer intended to re-sell them or that the buyer had any particular intent, is, therefore, wholly immaterial.

3.

Appellants attempt to distinguish *Class E* sales upon the basis that the goods were shipped into Indiana before the sale pursuant to prior order, citing *Sonneborn Bros. v. Cureton* (1922), 262 U. S. 506. But that case expressly distinguished between a tax against interstate commerce alone and a tax levied against interstate and domestic commerce alike and denied any effect to the original package rule. Cf. *McGoldrick v. Berwind-White Coal Mining Co.* (1940),

309 U. S. 33, where the goods sold were imported into New York from other States pursuant to prior order.

4.

Appellants point to the possibility that the State of Ohio might tax the use of some of the goods included in Class D. It does not appear at any point in the record that any such tax was actually levied. "It will be time enough to resolve that argument when a taxpayer paying in the state of origin is compelled to pay again in the state of destination." *Southern Pacific Co. v. Gallagher* (1939), 306 U. S. 167 citing *Henneford v. Silas Mason Co.*, 300 U. S. 577, 587.

Such a use tax is upon an entirely different transaction and would equally apply to a wholly intrastate sale where the buyer, after purchase and without any previous intent to do so, transported the property sold into Ohio and there used it.

One of the stipulations of the parties upon the trial of this cause was:

"(j) The gross receipts involved in this suit for refund were not taxed, and were not used as the measure of any tax assessed, in any other jurisdiction than the State of Indiana, and no tax has been paid by the Plaintiffs to any taxing jurisdiction other than the State of Indiana upon these identical gross receipts or which was measured by them."

Stipulation 40 (j), Rec., pp. 95-96.

Summary.

The Decision of the Supreme Court of Indiana Being in Strict Accord With Previous Decisions of This Court, No Substantial Federal Question Is Presented.

Three categories of sales are involved in this cause. In each instance appellants' propositions are directly foreclosed by previous decisions of this Court.

In Class C sales the only extrastate element involved was that due to the intra-corporate departmentalization of appellants' business; the orders taken from Indiana residents were routed through one of appellants' out-of-state branches to appellants' Indiana factory where delivery was made. Appellants cannot escape taxation by departmentalizing their business. Class C sales are taxable.

Nelson v. Sears-Roebuck & Co. (1941), 312 U. S. 359;
Nelson v. Montgomery Ward & Co. (1941), 312 U. S. 373;

Department of Treasury v. Wood Preserving Co. (1941), 313 U. S. 62.

Class D sales were those in which the purchaser resided outside the State of Indiana and the contract of sale was there negotiated but the sale was consummated by delivery in Indiana. Previous decisions of this Court directly hold such sales to be taxable by Indiana.

Department of Treasury v. Wood Preserving Co. (1941), 313 U. S. 62;

Superior Oil Co. v. Mississippi (1930), 280 U. S. 390.

Class E sales were those in which the only extra-state element was that the goods were delivered in Indiana by shipment from an out-of-state point. This Court has directly held that such shipment does not relieve the sale from taxation.

Allied Mills v. Dept. of Treasury (1942), — U. S. —, — L. Ed. —, 63 S. Ct. 666;

McGoldrick v. Berwind-White Coal Mining Co. (1940), 309 U. S. 33.

The Supreme Court of Indiana compared the cases of *Adams Mfg. Co. v. Storen* (1938) 304 U. S. 307, and *Allied Mills, Inc. v. Dept. of Treasury* — U. S. —, — L. Ed. —, 63 S. Ct. 666, and correctly held that the State where a

sale is consummated by delivery may tax the receipts from such sale. It has herein been shown that this decision in this cause is in strict accord with the principles established by this Court and that there is no valid basis for distinguishing this cause from the decisions in which this Court established such principles. Consequently, there is no substantial Federal question involved and thus appellees' motion to dismiss or affirm, filed herewith, should be sustained. *J. Bacon & Sons v. Martin* (1939), 305 U. S. 380, or this appeal should be treated as a petition for a writ of certiorari under section 237.(a) of the judicial code and such petition should be denied for want of a substantial Federal question.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 355

**INTERNATIONAL HARVESTER COMPANY AND
INTERNATIONAL HARVESTER COMPANY OF
AMERICA,**

vs.

Appellants,

**DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERT-
SON, AND FRANK G. THOMPSON, AS MEMBERS OF AND CON-
STITUTING THE BOARD OF DEPARTMENT OF TREASURY.**

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA.

**MOTION TO DISMISS APPEAL OR AFFIRM DECISION
OF STATE COURT.**

Now come appellees, Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as members of and constituting the Board of Department of Treasury, and move to dismiss the appeal herein on the ground that the case presents no substantial Federal question, and they further move,

if the motion to dismiss is not granted, that this Court affirm the decision of the Supreme Court of the State of Indiana on the ground that the questions on which the decision of this cause depends are so insubstantial as to need no further argument, all as appears in the Statement of Grounds Making Against the Jurisdiction of this Court filed herewith.

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Attorney General of Indiana;
WINSLOW VAN HORNE,
Deputy Attorney General of Indiana;
JOHN J. MCSHANE,
Deputy Attorney General of Indiana;
JOSEPH W. HUTCHINSON,
Deputy Attorney General of Indiana;
Of Counsel.

(8062)



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JAN 25 1944

CHARLES ELMORE DROPLEY
CLERK

No. 355

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

ON APPEAL FROM THE SUPREME COURT OF INDIANA

INTERNATIONAL HARVESTER COMPANY

AND

INTERNATIONAL HARVESTER COMPANY
OF AMERICA,

Appellants,

v.

DEPARTMENT OF TREASURY OF THE STATE OF
INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M.
ROBERTSON, AND FRANK G. THOMPSON, AS
MEMBERS OF AND CONSTITUTING THE
BOARD OF DEPARTMENT OF TREASURY,

Appellees.

APPELLEES' BRIEF

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INDEX

	<i>Page</i>
Reference to Opinion of the Indiana Supreme Court.....	1
Grounds on Which Jurisdiction of This Court Is In- voked	2
Concise Statement of the Case.....	3
Nature of the Action.....	3
Appellants' Intra-Corporate Organization.....	2
Distribution of Appellants' Products.....	4
Appellants' Sales Practices.....	5
Types of Sales Herein Involved.....	5
Summary of Argument.....	6
Argument	8
I. Class D Sales.....	14
II. Class C Sales.....	19
III. Class E Sales.....	20
IV. The Due Process Clause.....	22
Conclusion	23

LIST OF AUTHORITIES CITED

Page

I. TABLE OF CASES CITED:

Adams Manufacturing Co. v. Storen, 304 U. S. 307	11, 13, 17, 20
American Manufacturing Co. v. St. Louis (1919), 250 U. S. 459.....	18
Coe v. Errol (1885), 116 U. S. 517.....	15
Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282	17
Department of Treasury v. Allied Mills (1942), 220 Ind. 340, 42 N. E. (2d) 34, aff'd 63 S. Ct. 666	9, 13
Department of Treasury v. Ingram-Richardson Manufacturing Co. (1941), 313 U. S. 252.....	22
Department of Treasury v. Wood Preserving Co. (1941), 313 U. S. 62, reversing 114 Fed. (2d) 922	6, 10, 15, 22
Federal Compress Co. v. McLean (1933), 291 U. S. 17	17
Graybar Electric Co. v. Curry (1939), 238 Ala. 116, 189 So. 186, aff'd 308 U. S. 513.....	21, 22
Hans Rees Sons v. North Carolina (1931), 283 U. S. 123.....	22
Heisler v. Thomas Colliery Co. (1922), 260 U. S. 245	15

	<i>Page</i>
Henneford v. Silas Mason Co. (1936), 309 U. S. 577	15
Holland Furnace Co. v. Department of Treasury (1943), 133 Fed. (2d) 212.....	12, 13
Hope Gas Co. v. Hall (1926), 274 U. S. 284.....	15
Indiana Creosoting Co. v. McNutt (1936), 210 Ind. 656, 5 N. E. (2d) 310.....	9, 11
In re Conecuh Pine Lumber & Manufacturing Co. (1910), 180 Fed. 249.....	17
J. Bacon & Sons v. Martin (1939), 305 U. S. 380.....	10
McGoldrick v. Berwind-White Coal Mining Co. (1940), 309 U. S. 33.....	15, 21
McGoldrick v. DuGrenier, Inc. (1940), 309 U. S. 70	21
Miles v. Department of Treasury (1935), 209 Ind. 172, 199 N. E. 372, 101 A. L. R. 1359.....	9, 11, 12
Minnesota v. Blasius (1933), 290 U. S. 1.....	15, 18
Nashville, C. & St. L. Ry. v. Wallace (1932), 288 U. S. 249.....	15
Nelson v. Sears, Roebuck & Co. (1941), 312 U. S. 359	20
Sonneborn Bros. v. Cureton (1923), 262 U. S. 506	17, 21
Southern Pacific Co. v. Gallagher (1939), 306 U. S. 167	18
State Board of Equalization v. Blind Bull Coal Co. (1940), 55 Wyo. 438, 101 Pac. (2d) 70.....	17

	<i>Page</i>
State Tax Commission v. Aldrich (1942), 316 U.S.	
174	22
Storen v. J. D. Adams Mfg. Co. (1937), 212 Ind.	
343, 7 N. E. (2d) 941.....	9
Superior Oil Co. v. Mississippi, 280 U. S. 390.....	16
Trotwood Trailers, Inc. v. Evatt (Ohio, 1943), 51	
N. E. (2d) 645.....	16
Western Live Stock v. Bureau of Revenue (1938),	
303 U. S. 250.....	19
Wiloil Corporation v. Pennsylvania (1935), 294	
U. S. 169.....	21

II. TABLE OF STATUTES CITED:

Section 237a of the Judicial Code (28 U. S. C. A.	
344a)	2
Section 14, Indiana Gross Income Tax Act.....	2
Section 2, Gross Income Tax Act of 1933.....	8
Section 6a, Gross Income Tax Act.....	10

III. LEGAL PERIODICAL CITED:

Lockhart, Gross Receipts Taxes on Interstate	
Transportation and Communication, 57 Har-	
vard Law Review, 40 (Oct. 1943).....	20

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

ON APPEAL FROM THE SUPREME COURT OF INDIANA

INTERNATIONAL HARVESTER COMPANY AND
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Appellants,

v.

DEPARTMENT OF TREASURY OF THE STATE OF INDI-
ANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROB-
ERTSON, AND FRANK G. THOMPSON, AS MEMBERS
OF AND CONSTITUTING THE BOARD OF DEPARTMENT
OF TREASURY,

Appellees.

No. 355

APPELLEES' BRIEF

The case below is not yet officially reported in the Indiana Supreme Court Reports, but may be found reported in 47 N. E. (2d) at page 150.

GROUND'S ON WHICH JURISDICTION OF THIS COURT IS INVOKED

This is an appeal from the Supreme Court of Indiana in which appellants invoked the jurisdiction of this court under Section 237 (a) of the Judicial Code (28 U. S. C. A. 344a). Appellants contend that there is here drawn in question the validity of the Gross Income Tax Law of the State of Indiana on the ground of its being repugnant to the Constitution of the United States and that the decision of the Supreme Court of Indiana was in favor of its validity. The appellees filed herein a statement of matters and grounds making against the jurisdiction of this court and a motion to dismiss this appeal or affirm the decision of the state court upon the two grounds that decision of the state court was as to the application of the Act and that no substantial federal question is involved.

CONCISE STATEMENT OF THE CASE

Nature of the Action

This is a statutory action for a refund of Indiana Gross Income tax alleged to have been improperly collected. Such actions are authorized by Section 14 of the Indiana Gross Income Tax Act. No question is raised as to the procedure followed for the assessment of the tax or as to the proceedings pre-requisite to the filing of this action.

Appellants' Intra-Corporate Organization

Appellants' corporate reorganizations (R. 23-25) are ignored and Appellants are treated as a single corporate entity. (Appellants' Brief, p. 3.) It is a non-resident corporation (R. 23).

Appellant is engaged in the manufacture of a large line of farm implements, machinery and vehicles (R. pp. 25, 76). These are manufactured by appellants in several factories located in various states, two of which are in Indiana (R. 25), namely, a motor truck factory at Fort Wayne and a factory at Richmond for seeding machines and light tillage implements.

For the purpose of distributing the products so manufactured, appellants maintain a nation-wide organization, as follows:

1. *General Transfer Warehouses.* These are intermediate supply depots, located in the mid-western farm belt, maintaining general stocks of goods received from the factories and held for ready shipment during the selling season. They engaged in no selling activity. (R. 26.)

2. *Selling Branches.* These branches sell at wholesale to dealers and at retail to consumers. (R. 26.) They are of two types, "general line" and "motor truck," which are in some instances combined. (R. 25-26.)

General Line. These branches handle all goods except motor trucks. (R. 25.) Each maintains a warehouse (R. 75) and a stock of such goods as are in general use in its territory (R. 73), such stock being sufficient to supply about one-half of all its sales (R. 89). The selling branch negotiates and accepts on behalf of the seller all sales and sales contracts and collects the proceeds and is an independent unit for that purpose. (R. 33.) Each branch has a definitely assigned territory, has full control of and gets full credit for, all sales within that territory. (R. 68.) The location of and the territory assigned to, a branch house are determined by economic factors, the territory being a natural trade area which may or may not transcend

state boundaries and the location being the principal market place in that area. (R. 59-61.) The territories of the Fort Wayne, Terre Haute, Evansville and Indianapolis branches (being the only branches located in Indiana) included areas in the surrounding states, while the territories of the Kankakee, Illinois, Louisville, Kentucky, and Cincinnati, Ohio, branches included areas in Indiana not served by the Indiana branches. (R. 93.)

Motor Truck Branches. It does not appear from the record that the organization of the Motor Truck Branches differs from that of the General Line Branches except in respect to the goods sold and some variations of territory.

3. *McCormick-Deering Stores.* These are retail stores operated by a subsidiary company in locations where the company has been unable to secure adequate dealer representation. These stores operate under the supervision of the branch in whose territory it is located and the branch is required to approve all retail credit granted by them. There are several of these stores in Indiana. (R. 26, 55-56, 75.)

4. *The Home Office.* This is located at Chicago, Illinois, and exercises general executive and supervisory functions. (R. 23, 56-57.)

Distribution of Appellants' Products

Appellants' factories maintain no storage facilities, but upon manufacture ship the goods to the transfer houses, selling branches or dealers (R. 63), or deliver at the factory to fill specific orders (R. 67).

The transfer houses ship the goods as ordered either to the branch house, dealer or consumer.

The branch houses ship or deliver to either dealers or consumers to fill specific orders.

Appellants' Sales Practices

Appellants are primarily engaged in selling upon credit with title reserved in it until ultimate sale to and payment in full by the consumer. (R. 34, 34A.)

Wholesale sales are handled by the branch house which obtains from the dealer an annual contract for his estimated requirements (R. 32, 34-37), and takes his subsequent orders for additional goods (R. 32). These contracts and orders are subject to acceptance by the branch. (R. 32.) The place from which goods are shipped or at which they are delivered is ordinarily determined with regard to the speed with which they are desired and the cost of shipment. (R. 73-79, 81-91.)

Types of Sales Herein Involved

This cause involves *three* (3) types of sales, each of which the Supreme Court of Indiana held to be taxable. Appellants correctly describe the sales in question with the exception that they stress the fact that in Class C the orders were accepted at and payments made to appellants out of state branches but do not mention that in Classes D and E such acceptances and payments were made at appellants' in-state branches.

SUMMARY OF ARGUMENT

The tax here in question was assessed under that portion of Section 2 of the Gross Income Tax Law of Indiana imposing a tax *against non-residents* measured by the gross receipts of their intrastate activities. Both the state and federal courts have distinguished such tax against non-residents from that tax levied against residents measured by all of their receipts both interstate and intrastate.

I

CLASS D SALES

In this class of sales the contract consummated in Indiana was fully performed by delivery of goods in Indiana which had been manufactured in Indiana. The buyer lived outside Indiana and intended to convey the goods outside the state.

The goods were still a part of the common mass of property within the state and were subject to property taxation there and were subject to taxation upon the sale, that being the exercise of a right of property.

The fact that the purchaser intended to remove the property from the state after purchase does not convert the transaction into an interstate transaction and the tax here levied is valid under the direct authority of *Department of Treasury v. Wood Preserving Corporation* (1941), 313 U. S. 62.

II

CLASS C SALES

These are sales negotiated by appellants' out-of-state branches where the goods never moved in interstate com-

merce but were sold and delivered in Indiana to Indiana residents.

The performance of the contract of sale not being within the protection of the commerce clause, the formation of the contract is not within its protection.

III

CLASS E SALES

These are sales by a branch located within Indiana to a resident of Indiana where delivery was accomplished by interstate shipment of the goods into Indiana. Appellants' contention is that the contract of sale required such shipment and that therefore the sales were protected by the commerce clause. This attempted distinction has been specifically denied by this court and under the clear authorities of this court the sales are taxable.

IV

DUE PROCESS CLAUSE

The levy of this tax upon the sales here in question does not contravene the due process clause for the reason that the state was in each instance taxing intrastate exercise of rights of property and the doing of an intrastate business.

CONCLUSION

All receipts here involved were from sales made upon the Indiana market. Any burden of the tax would be upon sales on the Indiana market and would not be a burden upon interstate commerce.

ARGUMENT

The tax here in question was assessed under the Gross Income Tax Act of 1933. Section 2 of this act designated the taxable event upon which the excise is levied:

"There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided."

The Indiana Supreme Court has repeatedly recognized a distinction in this act between residents and non-residents. In the first case to arise under it the court held:

"We conclude that the tax in question is an excise, levied upon those domiciled within the state or who derive income from sources within the state, upon the privilege of domicile or the privilege of transacting business within the state, and that the burden may reasonably be measured by the amount of income. The reasoning which justifies a tax upon the basis of domicile as readily supports and justi-

fies a tax upon the basis of the right to receive income within or transact business under the protection of the state."

Miles v. Dept. of Treasury (1935), 209 Ind. 172, 188, 199 N. E. 372, 378, 101 A. L. R. 1359.

In *Indiana Creosoting Co. v. McNutt* (1936), 210 Ind. 656, 663, 5 N. E. (2d) 310, 313, the court again characterized the tax as an excise tax measured by gross income and reaffirmed the above quoted language in the *Miles* case.

Practically the same language was used by the court in *Storen v. J. D. Adams Mfg. Co.* (1937), 212 Ind. 343, 7 N. E. (2d) 941, 946.

This distinction drawn by the Indiana Supreme Court is strongly emphasized by a comparison of *Dept. of Treasury v. Allied Mills* (1942), 220 Ind. 340, 42 N. E. (2d) 34, aff'd 63 S. Ct. 666, and the decision of that court as to Class A sales in the case at bar (42 N. E. (2d) 150). In the former the taxpayer was an Indiana corporation; in the latter, a foreign corporation. In each, goods manufactured extra-state were sold through an extra-state sales branch to residents of Indiana, delivery being made by common carrier. Although the Indiana corporation had been held taxable in the *Allied Mills* case, the foreign corporation was held non-taxable in the present case, the court holding that the Class A receipts were not derived from sources within Indiana.

The clear import of these decisions is that although residents of Indiana are taxable upon all receipts from all transactions, non-residents engaged in business in Indiana, are taxable only upon their receipts from sources within

the state. (In each instance transactions which the Federal constitution prohibits the state from taxing are expressly excepted. *Section 6a, Gross Income Tax Act*, Appendix A, Appellant's Brief, p. 39.)

As to the non-resident here involved, the tax is conditioned upon its engaging in business in Indiana and deriving gross income from sources within the state. This construction of the statute under consideration is controlling upon this court: *J. Bacon & Sons v. Martin* (1939), 305 U. S. 380.

This construction of the act has also been approved and stated by this court. In *Wood Preserving Co. v. Dept. of Treasury* (1941), 313 U. S. 62, the Circuit Court of Appeals stated the contentions of the parties as follows (114 Fed. (2d) 922):

"It is contended by the plaintiff that the event was the receipt of gross income which occurred in Pennsylvania. If this position is sound, it is evident—in fact, not disputed—that the State of Indiana was without power to levy and collect the tax. It is defendants' contention as stated in their brief, that 'the thing which the Statute authorizes as the taxable event, the thing that was taxed, is the transaction which occurs in Indiana involved in one of two things, either doing business within the state or deriving income from a source within the State.' Under this theory, the gross income received in Pennsylvania is merely the measure for the tax."

Upon these contentions, the Circuit Court held for the plaintiff. The cause was appealed to this court where the petitioner renewed its contentions on pages 15-23 of its brief and this court reversed (313 U. S. 62), saying:

"The court below has held that under this statute the thing taxed was 'the receipt of gross income' and as the income in question was received by respondent in Pennsylvania, it was beyond the jurisdiction of Indiana; that, if the contrary theory of the taxing officials was sound, still the tax was invalid because no method was provided for allocating the tax to the income derived from that part of the business transacted in Indiana; and, further, that the transactions in question 'were had in interstate commerce,' that the tax discriminated against that commerce and for that reason was void.

"We think that the court was in error in each of these conclusions.

"As to the first point, the court relied upon our decision in *Adams Manufacturing Co. v. Storen*, 304 U. S. 307. That was a case under the same taxing act of Indiana, but there the tax was applied to gross receipts derived by an Indiana corporation from sales in other States of goods manufactured in Indiana. We observed that the tax was not an excise for the privilege of domicile 'Since it is levied upon the gross income of non-residents from sources within the state.' The point of that decision was that 'the tax is what it purports to be,—a tax upon gross receipts from commerce,' and that the tax was there laid upon receipts from sales to customers in other States and abroad which constituted interstate and foreign commerce. *Id.*, pp. 310, 311.

"The present question is as to the validity of the tax upon receipts 'derived from sources within the State,' that is, under Section 2 of the Act, from activities which petitioners insist were intrastate. * * *"

* To this statement the court cites *Miles v. Department of Treasury*, 209 Ind. 172, 188, and *Indiana Ceresoting Co. v. McNutt*, 219 Ind. 656, 664, each of which is herein discussed. (P. 8, *supra*.)

More recently, in *Holland Furnace Co. v. Department of Treasury* (1943), 133 Fed. (2d) 212, the Circuit Court of Appeals on authority of *Miles v. Department of Treasury*, 209 Ind. 172 (*cf. supra*, p. 8), said:

"Section 2 of the Act provides for a tax upon gross income 'derived from sources within the State of Indiana' of all non-resident persons or corporations. The tax is general, non-discriminatory, operating upon all classes alike, * * *"

This court denied certiorari October 11, 1943.

It must therefore be acknowledged that the settled construction of the Indiana Gross Income Tax Act of 1933 is that while the tax as to residents is conditioned upon the receipt of all income which Indiana is not prohibited from taxing by the Federal Constitution, non-residents are taxed only as they are "engaged in business in this state, or who derive gross income from sources within this state." The tax so levied against local activities is measured by "the gross income derived from sources in Indiana." A non-resident's liability for tax is limited to gross income received from Indiana sources and is conditioned upon (1) his being engaged in business in Indiana or (2) receiving such gross income from sources in Indiana. Activities by a non-resident within the State will not subject him to tax if such activities are merely incidental to a business conducted in another state. In the case at bar (47 N. E. (2d) 150, 152) the Indiana Supreme Court says:

"The appellants would have us construe the statute as exempting only income derived *entirely from activities* outside of Indiana. This would distort the clear import of the language employed and violate the rule stated above."

The Class A sales of Appellants which the Indiana Supreme Court held were non-taxable were described by that court as (47 N. E. (2d) 150, 151):

"Sales by branches located outside Indiana to dealers and users located in Indiana. These sales were made on orders solicited in Indiana by representatives of out-of-state branches. The orders were accepted by the outside state branch offices and the purchase money paid to them. Without directions from the purchasers, the goods were shipped to them in Indiana from branches, warehouses or factories located outside Indiana."

It is apparent by this decision concerning Class A sales that Indiana does not attempt to tax sales attributable to Petitioner's out-of-state business even though some activities incidental to such out-of-state business were carried on in Indiana (for example: the solicitation of orders by out-of-state branches in Class A sales). Conversely, Indiana does tax businesses conducted in Indiana by non-residents even though some of the activities incidental to such business are carried on in other states. Cf. *Holland Furnace Co. v. Department of Treasury* (1943), 133 Fed. (2d) 212.

Since the tax against residents upon their entire Gross income from all sources (including interstate commerce) differs materially from the tax against non-residents upon their intra-state activities alone, the cases involving the former (*J. D. Adams Manufacturing Co. v. Storen* (1937), 304 U. S. 307; *Department of Treasury v. Allied Mills* (1942), 220 Ind. 340, aff'd 63 S. Ct. 666) are inapplicable to the commerce clause questions presented in this case.

In the case at bar three types of transactions are in question. They are referred to as Classes C, D and E.

CLASS C. Petitioner was engaged in the business of manufacturing in Indiana and made unconditional delivery of the manufactured product to the purchaser at its plant in Indiana. The incidental out-of-state activity was that the contracts of sale were negotiated by an out-of-state branch sales office where payment was made.

CLASS D differs from Class C only in that the purchaser was a non-resident and at the time of delivery intended to and did transport the goods to their state of residence.

CLASS E. Petitioner maintained a branch office in Indiana where sales were negotiated with Indiana residents. The out-of-state activity arose by reason of the fact that the contract of sale required delivery by common carrier from without the state.

Thus, in each instance Petitioner maintained in Indiana an establishment at which it conducted a substantial business. Indiana seeks to tax such local business establishments and measures its tax by the gross receipts derived from Indiana sources. Does the Federal Constitution prohibit such a tax?

I

THE TAX ON CLASS D SALES IS NOT AN UNCONSTITUTIONAL BURDEN UPON INTERSTATE COMMERCE

In this class of sales the tax was laid upon the activities of the seller in transactions wherein a contract of sale, consummated by seller's acceptance at its branch in Indiana, was fully performed by such seller by delivery of the goods in Indiana where such goods were manufactured. The non-resident buyer (against whom no tax was levied)

intended to and did remove the goods from the state immediately following such delivery.

All of the activities of the seller (including manufacture of the goods) occurred in Indiana, except the solicitation of the order. All of the activities of the buyer except the acceptance of delivery, occurred outside Indiana. The tax is levied against the seller.

At the time when the sale was made and the goods were delivered, the goods had never been without the State of Indiana where they were manufactured. They were still a part of the common mass of property within the State of Indiana and were subject to property taxation there. *Minnesota v. Blasius* (1933), 290 U. S. 1; *Hope Gas Co. v. Hall* (1926), 274 U. S. 284. (tax measured by gross receipts); *Heisler v. Thomas Colliery Co.* (1922), 260 U. S. 245; *Coe v. Errol* (1885), 116 U. S. 517.

In relation to the commerce clause there is no distinction between a tax on property, the sum of all the rights and powers incident to ownership, and the taxation of the exercise of some of its constituent elements. *Nashville, C. & St. L. Ry. v. Wallace* (1932), 288 U. S. 249, 267-8; *Hemlock v. Silas Mason Co.* (1936), 300 U. S. 577, 582; *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, 52. Thus, appellants' activities in making these sales were essentially intrastate and taxable. Our previous discussion has shown that the tax was conditioned upon these intrastate activities. It therefore clearly follows that the decision below was correct.

In strict accord with this reasoning is the case of *Department of Treasury v. Wood Preserving Corp.* (1941), 313 U. S. 62. In that case this same tax was levied against

sales of ties produced in Indiana, where the sales were made pursuant to the terms of a contract negotiated and entered into outside the state, which contract required that the purchasing railroad company transport the ties to an Ohio plant for processing. The court there said (p. 68):

"These were local transactions—sales and deliveries of particular ties by respondent to the Railroad Company in Indiana. The transactions were none the less intrastate activities because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment. The contract providing for that treatment called for treatment of ties to be delivered by the Railroad Company at the Ohio plant, and the ties bought by the Railroad Company in Indiana, as above stated, were transported and delivered by the Railroad Company to that treatment plant. Respondent did not pay the freight for that transportation and the circumstance that the billing was in its name as consignor is not of consequence in the light of the facts showing the completed delivery to the Railroad Company in Indiana. See *Superior Oil Co. v. Mississippi*, 280 U. S. 390."

These statements apply equally to the Class D sales herein and this case is clear authority for the taxation of these sales. The recent case of *Trotwood Trailers, Inc. v. Evatt* (Ohio, 1943), 51 N. E. (2d) 645, had under consideration a similar problem in the application of the Ohio sales tax to those sales of automobile trailers where the buyer came into Ohio to take delivery. In a well reasoned opinion (in which the court relied heavily upon the *Wood Preserving* case) the tax was upheld.

Other cases to the same effect are: *Superior Oil Co. v. Mississippi* (1929), 280 U. S. 390, 395; *Federal Compress*

Co. v. McLean (1933), 291 U. S. 17; *State Board of Equalization v. Blind Bull Coal Co.* (1940), 55 Wyo. 438, 101 Pac. (2d) 70; *In re Conecuh Pine Lumber & Manufacturing Co.* (1910), 180 Fed. 249.

Against this established rule appellant cites three cases to each of which may be applied the statement of this court in *Sonneborn Bros. v. Cureton* (1923), 262 U. S. 506, 514, in regard to *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282:

"But that case was not concerned with the power to tax, but rather with the power of a state to prevent an engagement in interstate commerce within her limits, except by her leave. The holding there was that a contract for the purchase of a crop of grain in Kentucky to be delivered at a railway station in Kentucky for shipment to Tennessee, conformably to a settled course of business, was an interstate contract which a corporation not authorized by Kentucky to do business in that State might nevertheless make and enforce without incurring the penalty of the State law."

In *J. D. Adams Mfg. Co. v. Storen* (1938), 304 U. S. 307, by agreement between the parties, it was understood that interstate commerce was involved, while the contention in this case is not the application of the Gross Income Tax law to interstate commerce; but, first, whether the factual situation indicates that the transactions in question are actually in interstate commerce, or of such a character that a non-discriminatory state tax may be imposed.

Multiplicity of Taxes

Appellants lay particular emphasis upon their claim that, because the course of transactions between appellants

and the ultimate purchaser may be exposed to taxation by different states, any tax on this course of business is invalid.

Only one concrete example of such a possibility is offered by the appellants and that is the amendment of the Illinois Retailer's Occupation Tax Law purporting to tax *selling activities* in that state. Certainly, it must be admitted that, if this law be applied as claimed by appellants, it will increase their cost of doing business. So likewise would a property tax levied upon appellants' goods while a rest at one of its transfer warehouses, *Minnesota v. Blasius* (1933), 290 U. S. 1; or a tax upon its privilege of manufacture measured by sales price. *American Manufacturing Co. v. St. Louis* (1919), 250 U. S. 459. In each instance the tax is levied upon a local incident or activity separate and distinct from the interstate commerce involved. Here the tax is by its terms levied upon intrastate activities alone.

"The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing business. A discrimination against it, or a tax upon its operations as such, is an interference. A tax on property or upon a taxable event in the state, apart from operation, does not interfere."

Southern Pacific Co. v. Gallagher (1939),
306 U. S. 167.

It has heretofore been shown that the Indiana Gross Income Tax as to *non-residents* is levied against local activities engaged in by appellants under the protection of the laws of Indiana and for which the State now asks

payment. Because appellants' business organization assigns territories without regard to state boundaries, they ask to be relieved of all payment for these non-discriminating charges levied with mathematical equality upon intrastate commerce and interstate commerce alike.

II

THE TAX ON CLASS C SALES IS NOT AN UNCONSTITUTIONAL BURDEN UPON INTERSTATE COMMERCE

This class of sales is identical with Class D sales except that the buyer resided in Indiana and the appellants' branch was located out of state. An executory contract of sale, consummated by appellants' acceptance outside the state and calling for the sale of unascertained goods, was fully performed within the state by the delivery there of ascertained goods, *i. e.*, the particular truck sold. The goods themselves did not at any time move in Interstate commerce, but were conveyed by the purchaser to another point in Indiana.

Thus the only possible interstate or extrastate activity was the formation of the executory contract of sale. Upon these facts Class C sales fall directly within the rule stated in *Western Live Stock v. Bureau of Revenue* (1938), 303 U. S. 250, where the Court said (p. 253):

"That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question."

Furthermore, the sole cause of the extrastate element was the Appellants' departmentalization of its business whereby certain Indiana counties were assigned to out-of-state branches. *Cf. Nelson v. Sears, Roebuck & Co.* (1941), 312 U. S. 359. We may here interpolate that the appellee admits that such departmentalization was based upon sound economic factors and was not for the purpose of tax evasion. This was also true in the *Sears Roebuck* case.

The cases involving the taxation of the instrumentalities of Interstate Commerce being all of those cited by appellants on page 31 of their brief, evidence a development of law peculiar to that field and are not to be extended beyond that field. *Lockhart, Gross Receipts Taxes on Interstate Transportation and Communication*, 57 Harvard Law Review, 40 (Oct. 1943). The cases involving selling activities, herein cited, have so developed the law in that field that it is unnecessary and unprofitable to incumber their import with a comparison of decisions relating to a separate and distinct application of the commerce clause.

J. D. Adams Mfg. Co. v. Storen (1938), 304 U. S. 307, has previously been distinguished. (*Supra*, pp. 13 and 17.)

III

THE TAX ON CLASS E SALES WAS NOT AN UNCONSTITUTIONAL BURDEN UPON INTERSTATE COMMERCE

In Class E sales appellants' branch was actively engaged in business in Indiana in the selling of goods to Indiana customers. The only interstate element was that in the performance of the Indiana contract of sale the

goods were shipped from an out-of-state factory, warehouse or branch direct to the customer. The customer paid the freight and no tax was levied upon the cost of transporting the goods across the state lines.

Appellants rely upon *Sonneborn Bros. v. Cureton* (1923), 262 U. S. 506 (a case of foreign export), and attempts to distinguish *Wiloil Corporation v. Pennsylvania* (1935), 294 U. S. 169, upon the basis that the contract did not there require interstate shipment, while in the case at bar interstate shipment was directed by the purchaser. Since the above decisions this court affirmed the decision in *Graybar Electric Co. v. Curry* (1939), 238 Ala. 116, 189 So. 186, *Aff'd* 308 U. S. 513, wherein the Class A sales were made upon a contract specifically requiring that the goods be shipped in interstate commerce.

In *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 309 U. S. 33, 53-55, the contention here advanced by appellants was examined at length and specifically rejected. In *McGoldrick v. DuGrenier, Inc.* (1940), 309 U. S. 70, the statement of facts discloses that the goods were shipped in interstate commerce direct to the purchaser.

As heretofore shown, this tax is levied upon appellants' intrastate activities. These consisted of maintaining a branch of its business where a stock of goods was kept (Record, pp. 61-62) and where orders are solicited and accepted and payments received (Record, p. 33, par. 26). In other words, it was a general intrastate business. Class E sales arose when orders were for large amounts of goods which could not economically be carried in stock and where a cheaper freight rate could be obtained by direct shipment. Such sales were in furtherance of and incidental to this intrastate business against which the tax was levied.

The transactions were in all respects similar to those in *Graybar Electric Co. v. Curry* (1938), 238 Ala. 116, 189 So. 186, *supra*, and are equally taxable. It has not yet been held that the parties may by their contract render that non-taxable which would otherwise be taxable.

IV

THE TAX DOES NOT CONTRAVENE THE DUE PROCESS CLAUSE

Appellants do not extensively argue their contention that the tax as here laid is upon extrastate activities in violation of the due process clause of the United States Constitution. Nor will the appellee indulge in a vain parade of the many authorities directly holding that where the activity taxed occurs even partially within the state, jurisdiction to tax is established under this provision of the Constitution. Cf. *Department of Treasury v. Wood Preserving Corp.* (1941), 313 U. S. 62; *Department of Treasury v. Ingram-Richardson Manufacturing Co.* (1941), 313 U. S. 252; *State Tax Commission v. Aldrich* (1942), 316 U. S. 174.

This tax is measured by the volume of such activities as expressed in the gross receipts arising from them within the state. It does not attempt to reach out of the state for such measure as was the case in *Hans Rees Sons v. North Carolina* (1931), 283 U. S. 123, cited by appellants.

CONCLUSION

The tax, as levied against non-residents of the state, is conditioned upon their intrastate activities and measured by the receipts therefrom. All of the receipts here involved arose from sales upon the Indiana market. In Class D the purchasers elected to come to that market to obtain their goods at less cost. In Classes C and E the purchasers were residents of the state and deliveries were made in Indiana at the Indiana cost. The theme of the whole act is that of equality and no distinction is made between intrastate and interstate commerce.

In Classes C and D appellant engaged in no interstate commerce and the sale taxed was completed before the interstate shipment began. In Class E the decisions of this court establish that the interstate movement was merely incidental and the tax does not constitute a burden upon it.

The judgment of the Supreme Court of Indiana should be affirmed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

INTERNATIONAL HARVESTER COMPANY and
INTERNATIONAL HARVESTER COMPANY OF AMERICA,
Appellants,

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, **No. 355.**
M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON,
and FRANK G. THOMPSON, as Members and Con-
stituting the Board of Department of Treasury,
Appellees.

APPELLANTS' PETITION FOR RE-HEARING.

International Harvester Company and International Harvester Company of America, Appellants in the above appeal, hereby respectfully petition for a re-hearing.

As agreed to in the Stipulation of Facts (R. 24-25) we shall in this Petition, as in the briefs already filed, treat the International Harvester Company as the sole party plaintiff and appellant, and shall hereafter use the word "Appellant" in this Petition as covering both companies.

This Petition is restricted to the question of the tax on Class D sales.

Class D sales are sales by the branches of Appellant in Indiana, namely, the branches at Fort Wayne, Evansville and Terre Haute, which have territory outside Indiana, to dealers and consumers residing outside Indiana, who came to Indiana and took delivery of the goods themselves in Indiana, and then transported their goods to their homes in Kentucky, Ohio, and Illinois.

More than 94% of Class D sales were wholesale sales, namely sales by the branches to dealers. In 1935, the wholesale sales were \$544,902.16. The retail sales in 1935 were \$21,024.71. In 1936, the wholesale sales were \$546,892.24, and the retail sales were \$33,182.06. (R. 45.)

We believe that the Court's opinion is based on the following three points:

1. Referring to the tax on Class D sales, the Court states in the last sentence of the opinion: "To deny Indiana this power would be to make local industry suffer a competitive disadvantage."

We are unable to conceive of a case where local industry would suffer a competitive disadvantage if the tax on Class D sales were held invalid, and we submit that no such case can be postulated.

2. On the question of multiple taxation, the Court says, "But it will be time to cross that bridge when we come to it."

We submit that this rule is directly contrary to the rule laid down by this Court in *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307 and *Gwin, White & Prince, Inc. v.*

Henneford, 305 U. S. 434, where this Court held that unlawfulness of the burden did not depend on the contingency that a tax had already been levied on the same gross receipts by another jurisdiction.

3. The Court declares that the case is governed by the decision in *Department of Treasury, et al. v. Wood Preserving Corporation*, 313 U. S. 62, where this Court held that the Indiana Gross Income Tax could be applied to sales of railroad ties by the Wood Preserving Corporation to the Baltimore & Ohio Railroad Company.

To this we submit that the situation presented in the Wood Preserving Corporation case was exceptional and we do not believe that the rule of that case should be applied to Class D sales where it appeared that the seller and the buyers had been dealing with each other for years, and where the buyers who had contracts calling for shipment to them of the goods made their own delivery for the purpose of saving freight expense or expediting delivery or for both reasons.

We shall now take up these three points more at length—

1. *The question of competitive disadvantage.*

We have carefully considered the point of competitive disadvantage to local industry, in case the tax on Class D sales were held invalid, and we have been unable to see that local industry could suffer such a competitive disadvantage. We have tried to imagine a case where a local industry would be put at a competitive disadvantage if the International Harvester Company were relieved of the tax on Class D sales. We do not believe that such a competitive disadvantage can arise.

The Traffic World Map in evidence in this case shows that Evansville is the center of a wholesale trade area covering parts of Illinois, Kentucky and Indiana; that Fort Wayne is the center of a wholesale trade area which extends into Ohio counties along the Ohio-Indiana line; and that Terre Haute is the center of a trade area which includes parts of west central Indiana and east central Illinois (Plaintiff's Exhibit 2, R. 94). A similar showing is made by the map of "Wholesale Grocery Trading Areas," prepared by the United States Department of Commerce (Plaintiff's Exhibit 3, R. 95).

It is evident, therefore, that a local industry in Indiana selling to buyers in east central Illinois would be selling in the same general territory as that covered by the Appellant's Terre Haute branch. Likewise a local Indiana industry selling to buyers in southeastern Illinois and northwestern Kentucky, would be selling in the same general territory as that handled by Appellant's Evansville branch; and a local Indiana industry selling to Ohio buyers would be conducting its activities in the same general territory as Appellant's Fort Wayne branch. It might well be that local industries would have their selling offices located in Fort Wayne, Terre Haute, and Evansville, as in the case of the Appellant.

If, then, a local industry with a sales office in Terre Haute, for example, sold to a buyer in east central Illinois, the local industry would either ship the goods to the buyer by rail, or the buyer would come to Terre Haute and get the goods, as the buyers did in Class D. If the local industry in such case shipped the goods by rail to the buyer in Illinois, the sale would not be subject to the Indiana Gross

Income tax under the decision in the case of *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307.

If, therefore, the Court should hold in this case that the sales in Class D are not subject to the Indiana Gross Income tax, then in case a local industry handled its sales to purchasers in Class D territory in the same manner as International Harvester Company handled them, the local industry would not be subject to the Indiana Gross Income tax on such sales.

We fail to see, therefore, how a local industry could be put at a competitive disadvantage if the tax on Class D sales were held invalid.

We do not believe that the Court means to say that a local industry would suffer a "competitive disadvantage" because it will pay a local tax if it makes an intrastate sale from an office in Illinois to a buyer in Illinois, or from an office in Ohio to a buyer in Ohio, or from an office in Kentucky to a buyer in Kentucky, whereas if the tax on Class D sales is held invalid, the International Harvester Company would pay no tax. By a parity of reasoning *any* exemption of an interstate transaction from a local tax because of the commerce clause would create a "competitive disadvantage" against an intrastate transaction. It is obviously not possible to obtain competitive equality between local tax burdens on intrastate sellers in different states. One state may have a 3% sales tax and another state no sales tax. The tax systems in the different states vary greatly, and we submit that it is impossible to obtain competitive equality between a local seller in Indiana and a local seller in Illinois or Kentucky or Ohio.

As a matter of fact, however, Kentucky has no sales tax, wholesale or retail. Moreover, the Illinois Retailers' Occupation Tax applies only to sales at retail, namely, sales to the consumer. (Smith-Hurd Ill. Stat., ch. 120, § 440.) Likewise, Ohio has no tax on wholesale sales. The Ohio sales tax applies to sales to the consumer only, and even the retail tax does not apply to sales of agricultural implements and machines. (General Code of Ohio, § 5546-1.)

We have already seen that 94% of the sales in Class D were wholesale sales.

Therefore the result of sustaining the tax on Class D sales will be to subject the Appellant to a tax on wholesale sales which a competitor would not pay on intrastate sales made in Ohio, Kentucky or Illinois, and, further, to subject the Appellant to a tax on retail sales which a competitor making a local sale in Kentucky would not pay, and a competitor making an intrastate sale of agricultural implements in Ohio would not pay.

We conclude that the fear of a competitive advantage to the Appellant is groundless.

2. *The Question of Multiple Taxation.*

We submit that the statement of the Court as to multiple taxation, that it will cross the bridge of multiple taxation when it comes to it, is directly contrary to the decision of the Court in *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434. That case involved a tax by the State of Washington on gross receipts from the marketing of fruit which was shipped from the State of Washington to the places of sale in various states and foreign countries, and sold in those states and foreign countries by Gwin, White

& Prince, Inc. as the marketing agent for the fruit growers.
This Court said on page 440:

“Unlawfulness of the burden depends upon its nature measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden. . . .”

The same principle was declared in *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307. The Court said on page 311:

“The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids.”

There was no showing in the *J. D. Adams* case that there had been a tax already laid by another state.

This Court in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, declared that “The rationale of the *Adams Manufacturing Co.* case does not call for condemnation of the present tax” (p. 58).

In the dissenting opinion of Mr. Chief Justice Stone in *Northwest Airlines, Inc. v. State of Minnesota*, decided on the same day as the case at bar it is stated that Minnesota could not justify its

“imposition of an undue proportion of the total tax burden which can be imposed on an interstate

carrier by saying that other states have taken or may take less than their share of the tax. It is enough that the tax exposes petitioner to 'the risk of a multiple burden to which local commerce is not exposed', *Adams Mfg. Co. v. Storen, supra*, 311; *Gwin, White & Prince, Inc. v. Henneford, supra*, 439, and cases cited."

Taxpayers naturally have relied on the definite statement by this Court in the *Adams* case and in *Gwin, White & Prince, Inc. v. Henneford, supra*, that it is not necessary for a taxpayer to show an *actual* multiple tax if the situation is such that the taxpayer is thrown wide open to the possibility of multiple taxation.

We think it fair to say that neither the Appellee nor the Appellant in this case has been dilatory and yet it has taken until 1943 to bring before this Court an appeal based on taxes for the years 1935 and 1936. We submit that the taxpayer should not be forced to wait four or five years more in order to present to this Court definite proof of multiple taxation when the Court has vigorously held in the *Adams* and *Gwin, White & Prince* cases that such proof was not necessary.

It is as certain as any question in taxation can be that such multiple taxation will be imposed.

We note that Mr. Justice Rutledge in his concurring opinion referring to Class D sales states that whether Illinois "could impose a use tax or some other as a property tax is not presented and need not be determined."

But the threat of multiple taxation on Class D sales is not merely the threat of a use tax by the state where the buyers live. 94% of Class D sales were wholesale

sales and the use tax is never applied to wholesale sales to the dealer but merely to retail sales to the consumer.

The threat of multiple taxation in Class D sales is the threat of a sales tax by the state of the buyer when the state of delivery of the goods has already imposed a sales tax.

We showed in our Appellant's Reply Brief that we have more here in Class D than a situation where the taxpayer is exposed to the threat of multiple taxation. We showed that the State of Illinois in the summer of 1943 amended the Illinois Retailers' Occupation tax to provide specifically that the tax would be applied on retail sales where a seller with an office outside of Illinois sends his salesmen into Illinois to solicit business and where the buyers come to the seller's place of business at the office outside of Illinois, obtain the goods themselves and bring them to their homes in Illinois. It is as certain as the operation of any tax law can be that Illinois will attempt to collect the tax on retail sales in Class D.

It may be argued that the Illinois tax could not be imposed on Class D retail sales because of this Court's decision in the case of *McLeod v. J. E. Dilworth Co.* (decided the same day as the case at bar), where it said that the J. E. Dilworth Company was "through selling in Tennessee" when it shipped the goods from Memphis to the buyers in Arkansas. The situation, however, has one difference, namely, that the International Harvester Company does have places of business in Illinois, Ohio and Kentucky and the J. E. Dilworth Company had no places of business in Arkansas. We do not believe that this difference should have any effect on the application

of a tax to Class D sales since Appellant's Illinois branches, for example, have absolutely nothing to do with the Illinois territory handled by the Terre Haute branch, or the Illinois territory handled by the Evansville branch, so far as Class D sales are concerned. But although there is no office of the Appellant in Illinois which in any way touches the business just as in the Dilworth Company case the Dilworth Company had no office in Arkansas which touched its business, it can hardly be doubted that state taxing authorities will contend that because Appellant has places of business in Illinois, Kentucky and Ohio, therefore Illinois, Kentucky and Ohio can tax Class D sales.

Since we are faced with an Illinois statute taxing retail sales to Class D buyers in Illinois and since there is a definite possibility of taxes on both wholesale and retail sales to Class D buyers by Illinois, Ohio and Kentucky, we submit that it is a matter of importance that this Court grant a rehearing on the question of Class D sales.

3. *The rule in the Wood Preserving Corporation case arose from an exceptional situation and should not be applied to Class D sales.*

Finally, we submit that the case of *Department of Treasury, et al. v. Wood Preserving Corporation*, 313 U. S. 62, on which the Court strongly relies in its opinion in this appeal, has striking and material differences from the situation in the case at bar.

The situation in the *Wood Preserving Corporation* case was exceptional, and the rule in that case should not be extended to a situation such as that presented in Class D. The Wood Preserving Corporation, the seller, had no place of business in Indiana. Representatives of the Railroad Company met with representatives of the seller in

Indiana, the ties were inspected, they were loaded on cars of the Railroad Company, and shipped to the treating plant of a subsidiary company of the Wood Preserving Corporation located at Finney, Ohio. But in the case at bar the record shows that the dealers and consumers both have had long relations with the Appellant. The dealers operated under annual contracts. The contracts provided for shipment by the Appellant to the buyers (R. 34A). The shipments would come either from the factory or branch house making the sale or one of the transfer houses of Appellant, none of which was located in Indiana. In the case of retail sales of motor trucks, the contracts provide for shipment to the buyer (R. 39). In the case of a retail order for general line goods, namely, farm implements and machinery, the contracts provide for the goods to be delivered to the buyer at the seller's place of business and that the buyer agrees to pay freight "on same from * * * (R. 38.) There was strong evidence in the record of a saving in freight if the buyer came to the branch and got his own goods, or if the buyer went to the factory at Fort Wayne or Richmond and got his goods and took them home with him. (Exhibit 5, R. 97, and Exhibit 6, R. 99.)

In short, the buyer and the seller were dealing with each other across state lines and had been for many years, particularly in the case of dealers. The orders were transmitted across state lines, the acceptances were transmitted across state lines, and the normal course would be for the goods to be shipped across state lines or from points outside of Indiana. More than 80% of the sales made by the Class D branches were so completed (R. 43, 101-2).

If then, obviously to save freight or to get quicker delivery, the buyer (dealer or consumer) goes to the factory

or branch and takes the goods back, the transaction, we submit, should not be burdened with a tax in that case with which it would not be burdened if the goods are shipped by rail.

No such elements were present in the *Wood Preserving Corporation* case. There was nothing to show that there had been dealings between the Wood Preserving Corporation and the Baltimore & Ohio Railroad for years, and that the normal course was for the Wood Preserving Corporation to ship the ties itself to the Railroad Company.

This Court has frequently told taxpayers that they cannot convert a normal intrastate transaction into an interstate transaction by providing unusual terms or conditions.

We submit that since Class D sales are normal *interstate* transactions, this Court should not convert a normal interstate transaction into an *intrastate* transaction simply because the buyer to save expense and time makes his own delivery. This Court has frequently held in the cases we cited on page 25 of Appellants' Brief that where goods are purchased by a buyer in one state and transported by the buyer to another state, the transaction is one in interstate commerce. We see no reason why such a transaction should not be treated as interstate commerce for the purpose of taxation as well as for all other purposes. We submit, therefore, that the tax on Class D sales should not be sustained.

In its opinion in the instant case the Court refers with approval to its per curiam decision in *Allied Mills, Inc. v. Department of Treasury*, 318 U. S. 740, affirming the decision of the Indiana Supreme Court, 42 N. E. 2d 34,

which held that the buyer's state may tax an interstate sale. Yet in the case at bar the state of delivery, which is *not* the state of the buyer, is permitted to tax Class D sales. In *McLeod v. J. E. Dilworth Company*, this Court invalidated a tax by the state of the buyer. We are therefore still without a rule of general application to guide us. All we can say is that if the precise facts of a new case fit exactly the facts of a case on which this Court has ruled, the tax result in the new case is presumably known.

The difficulty of applying conflicting rulings that the state of the buyer may tax and that the state of delivery may tax is illustrated by the recent decision of the Supreme Court of California in *Standard Oil Company v. Johnson*, 147 P. 2d 577, in which it was held that the sale of oil physically delivered to California to the buyer (a railroad company) for transportation by the buyer to another state was not a sale made in California, because the railroad in transporting the oil was acting in its capacity as a common carrier. The California Court thereby avoided the unfairness of the arbitrary rule that the state of delivery may tax. Permitting a tax by the buyer's state on delivery to the buyer there, as in the New York City cases, has a basis of fairness in that the tax falls at the place of competition. But the bald rule that the state of delivery may tax is arbitrary and unfair and should be modified.

The Indiana gross income tax is still before this Court, in *Freeman v. Hewit*, No. 788, on appeal from the Indiana Supreme Court, 51 N. E. 2d 6, in which probable jurisdiction was noted on April 3, 1944, and in *Ford Motor Company v. Department of Treasury*, No. 958, in which certiorari was granted on May 29, 1944, to review a decision of the

Circuit Court of Appeals for the Seventh Circuit, 141 F. 2d 24. Both cases involve the question of the taxability of interstate sales. It is opportune therefore that the decision as to the Class D sales of International Harvester Company be reviewed and corrected.

We respectfully petition for a rehearing by this Court on the question of the taxation of Class D sales.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 355.—OCTOBER TERM, 1943.

International Harvester Company and
International Harvester Company
of America, Appellants,

vs.

Department of Treasury of the State
of Indiana, M. Clifford Townsend,
Joseph M. Robertson, et al., etc.

Appeal from the Supreme
Court of the State of
Indiana.

[May 15, 1944.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

This case raises questions concerning the constitutionality of the Indiana Gross Income Tax Act of 1933 (L. 1933, p. 388, Burns Ind. Stats. Ann. § 64-2601) as construed and applied to certain business transactions of appellant companies. The suit was brought by appellants to recover gross income taxes paid to Indiana during the years 1935 and 1936. The Indiana Supreme Court sustained objections to the imposition of the tax on certain sales but allowed the tax to be imposed on other types of transactions. — Ind. —, 47 N. E. 2d 150. The correctness of the latter ruling is challenged by the appeal which brings the case here. Judicial Code § 237, 28 U. S. C. § 344(a), 28 U. S. C. § 861(a).

Appellants are corporations authorized to do business in Indiana but incorporated under the laws of other States. They manufacture farm implements and motor trucks and sell those articles both at wholesale and retail. During the period here in question they maintained manufacturing plants at Richmond and Fort Wayne, Indiana and selling branches at Indianapolis, Terre Haute, Fort Wayne, and Evansville, Indiana. They also had manufacturing plants and sales branches in adjoining States and elsewhere. Each branch had an assigned territory. In some instances parts of Indiana were within the exclusive jurisdiction of branch offices which were located outside the State. The transactions which Indiana says may be taxed without infringement of the

2 *Int'l Harvester Co. et al. vs. Dept. of Treas. of Indiana et al.*

federal Constitution are described by the Indiana Supreme Court as follows:

Class C: Sales by branches located outside Indiana to dealers and users residing in Indiana. The orders were solicited in Indiana and the customers took delivery to themselves at the factories in Indiana to save time and expense of shipping.¹

Class D: Sales by branches located in Indiana to dealers and users residing outside of Indiana, in which the customers came to Indiana and accepted delivery to themselves in this state.²

Class E: Sales by branches located in Indiana to dealers and users residing in Indiana, in which the goods were shipped from points outside Indiana to customers in Indiana, pursuant to contracts so providing.³

The gross income tax⁴ collected on those transactions is the same one which was before this Court in *Department of Treasury*

¹ The stipulation states that the "orders and contracts were accepted by branches outside Indiana" and payments "were received by branches outside Indiana." The Class C sales were principally sales of motor trucks manufactured at Fort Wayne and a small amount of goods manufactured at Richmond. In case of wholesale sales it is the custom for the dealer to notify the company at the time he desires delivery that he wants to take delivery of the goods himself at Fort Wayne or Richmond. In the case of retail sales in Class C, "if the user desires to undertake transportation of the goods to their destination and for that purpose to take delivery at the factory in Indiana, it is the business practice for the contract or order so to state."

² The stipulation states that the "orders or contracts were accepted and the sales proceeds were received by the Branch Managers at the branches located within Indiana." The business custom or practice respecting deliveries in the State to dealers or retail purchasers was the same as in case of the Class C sales.

³ The stipulation states that the goods in this class were shipped by the company from outside the State, the order or contract specifying that "shipment should be made from a point outside Indiana to the purchaser in Indiana." In these cases, moreover, the orders were "solicited from purchasers residing in Indiana by representatives of Indiana branches, or the orders or contracts were received by mail by Indiana branches. The orders and contracts were accepted by the Branch Manager at branches located within Indiana. Payments of the sales proceeds were received by branches in Indiana. The sales in this class were of goods manufactured outside the State of Indiana."

There was no showing, moreover, that goods in this class were of kind that could be obtained only outside Indiana. It seems to be admitted that Class E sales arose when an Indiana branch received orders for goods in quantities which could not be economically carried in stock or where a cheaper freight rate could be obtained by direct shipments from outside Indiana. Cf. *Bowman v. Continental Oil Co.*, 256 U. S. 642; *Sonneborn Bros. v. Cureton*, 262 U. S. 506.

⁴ Sec. 2 of the Act provided in part: "There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all resi-

v. Wood Preserving Corp., 313 U. S. 62 and *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307. The tax was described in the *Storen* case as "a privilege tax upon the receipt of gross income." 304 U. S. p. 311. In that case an Indiana corporation which manufactured products and maintained its home office, principal place of business, and factory in Indiana sold those products to customers in other States and foreign countries upon orders taken subject to approval at the home office. It was held that the Commerce Clause (Art. I, Sec. 8 of the Constitution) was a barrier to the imposition of the tax on the gross receipts from such sales. But as we held in the *Wood Preserving Corp.* case, neither the Commerce Clause nor the Fourteenth Amendment prevent the imposition of the tax on receipts from an intrastate transaction even though the total activities from which the local transaction derives may have incidental interstate attributes.

The objections under the Commerce Clause and the Fourteenth Amendment to the tax on the receipts from the three classes of sales involved here are equally without merit.

In the *Wood Preserving Corp.* case contracts were made outside Indiana for the sale of railroad ties. The respondent-seller, a Delaware corporation with its principal place of business in Pennsylvania, obtained the ties from producers in Indiana and delivered them to the buyer (Baltimore & Ohio Railroad Co.) in Indiana who immediately loaded them on cars and shipped them out of the State. Payments for the ties were made to the seller in Pennsylvania. We held that Indiana did not exceed its constitutional authority when it laid the tax on the receipts from those sales.

We see no difference between the sales in the *Wood Preserving Corp.* case and the Class C sales in the present one which is translatable into a difference in Indiana's power to tax. The fact that the sales in Class C are made by an out-of-state seller and that

dents of the state of Indiana, and upon the gross income derived from sources within the state of Indiana, of all persons and/or companies, including banks, who are not residents of the state of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities." The language of this section was recast by L. 1937, c. 117, § 2, p. 611.

Sec. 6(a) of the Act exempted "so much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the state of Indiana is prohibited from taxing under the Constitution of the United States of America." And see L. 1937, c. 117, § 6, p. 615.

the contracts were made outside the State is not controlling. Here as in the *Wood Preserving Corp.* case, delivery of the goods in Indiana is an adequate taxable event. When Indiana lays hold of that transaction and levies a tax on the receipts which accrue from it, Indiana is asserting authority over the fruits of a transaction consummated within its borders. These sales, moreover, are sales of Indiana goods to Indiana purchasers. While the contracts were made outside the State, the goods were neither just completing nor just starting an interstate journey. It could hardly be maintained that Indiana could not impose a sales tax or a use tax on these transactions. But, as we shall see, if that is the case, there is no constitutional objection to the imposition of a gross receipts tax by the State of the buyer.

The Class D sales are sales by an Indiana seller of Indiana goods to an out-of-state buyer who comes to Indiana, takes delivery there and transports the goods to another State. The *Wood Preserving Corp.* case indicates that it is immaterial to the present issue that the goods are to be transported out of Indiana immediately on delivery. Moreover, both the agreement to sell and the delivery took place in Indiana. Those events would be adequate to sustain a sales tax by Indiana. In *McGoldrick v. Berwind-White Co.*, 309 U. S. 33, we had before us a question of the constitutionality of a New York City sales tax as applied to purchases from out-of-state sellers. The tax was "laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price." *Id.*, p. 43. And it was "conditioned upon events occurring" within New York, i. e., the "transfer of title or possession of the purchased property." *Id.*, pp. 43-44. Under the principle of that case, a buyer who accepted delivery in New York would not be exempt from the sales tax because he came from without the State and intended to return to his home with the goods. The present tax, to be sure, is on the seller. But in each a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce. In neither does the tax aim at or discriminate against interstate commerce. The operation of the tax and its effect on interstate commerce seem no more severe in the one case than in the other. Indeed, if we are to remain concerned with the practical operation of these state taxes rather than with their descriptive labels (*Nelson v. Sears, Roebuck &*

Co., 312 U. S. 359, 363), we must acknowledge that the sales tax sustained in the *Berwind-White* case "was, in form, imposed upon the gross receipts from an interstate sale." Lockhart, *Gross Receipts Taxes on Interstate Transportation and Communication*, 57 Harv. L. Rev. 40, 87. But that case did no more than to hold that those in interstate trade could not complain if interstate commerce carried its share of the burdens of local government which helped sustain it. And there was no showing that more than that was being exacted.

The sales in Class E embrace those by an Indiana seller to an Indiana buyer where the goods are shipped from points outside the State to the buyer. The validity of the tax on receipts from such sales would seem to follow *a fortiori* from our recent affirmation *per curiam* (318 U. S. 740) of *Department of Treasury v. Allied Mills, Inc.*, 220 Ind. 340, 42 N. E. 2d 34. In that case an Indiana corporation had one factory in Indiana and two in Illinois. Each factory was given a specified part of Indiana to service—a method of distribution adopted to take advantage of favorable freight rates, not to evade taxes. The issue in the case was whether the Indiana gross income tax could be applied to receipts from sales to resident customers in Indiana to whom deliveries were made from the plants in Illinois pursuant to orders taken in Indiana and accepted in Illinois. The Indiana Supreme Court sustained the imposition of the tax. We affirmed that judgment on the authority of *Felt & Tarrant Co. v. Gallagher*, 306 U. S. 62, and *McGoldrick v. Felt & Tarrant Co.*, 309 U. S. 70.

In the latter cases the *Felt & Tarrant Co.* was an Illinois seller who had agents soliciting orders in California and New York. All orders were forwarded to the Illinois office for approval. If accepted, the orders were filled by shipping the products to the local agent who delivered to the purchaser. At times shipments would be made direct to the buyers. Remittances were made by the customers direct to the Illinois office. In the first of these cases the Court sustained the collection from the seller of the California use tax. In the second we upheld on the authority of *McGoldrick v. Berwind-White Co.*, *supra*, the imposition by New York City of its sales tax on those purchases.

We do not see how these cases can stand if the Class E sales are to be exempt on constitutional grounds from the present tax.

Indeed the transactions in Class E have fewer interstate attributes than those in the *Felt & Tarrant Co.* cases since the agreements to sell were made in Indiana, both buyer and seller were in Indiana, and payments were made in Indiana. It is of course true that in the *Felt & Tarrant Co.* cases taxes of different names were involved. But we are dealing in this field with matters of substance not with dialectics. *Nelson v. Sears, Roebuck & Co., supra.* In this case as in the foregoing sales tax cases the taxable transaction is at the final stage of an interstate movement and the tax is on the gross receipts from an interstate transaction. In form the use tax is different since it is levied on intrastate use after the completion of an interstate sale. But we recognized in the *Berwind-White* case that in that setting the New York sales tax and the California use tax had "no different effect upon interstate commerce." 309 U. S. p. 49. And see *Nelson v. Sears, Roebuck & Co., supra.* The same is true of this Indiana tax as applied to the Class E sales. There is the same practical equivalence whether the tax is on the selling or the buying phase of the transaction. See Powell, *New Light On Gross Receipts Taxes*, 53 Harv. L. Rev. 909, 929. Each is in substance an imposition of a tax on the transfer of property. In light of our recent decisions it could hardly be held that Indiana lacked constitutional authority to impose a sales tax or a use tax on these transactions. But if that is true, a constitutional difference is not apparent when a "gross receipts" tax is utilized instead.

Here as in case of the other classes of sales there is no discrimination against interstate commerce. The consummation of the transaction was an event within the borders of Indiana which gave it authority to levy the tax on the gross receipts from the sales. And that event was distinct from the interstate movement of the goods and took place after the interstate journey ended.

Much is said, however, of double taxation, particularly with reference to the Class D sales. It is argued that appellants will in all probability be subjected to the Illinois Retailers' Occupation Tax for some of those sales, since that tax is said to be exacted from those doing a retail business in Illinois even though orders for the sales are accepted outside of Illinois and the property is transferred in another State.⁵ But it will be time to cross that bridge when we come to it. For example, in the *Wood Pre-*

⁵ See L. Ill. 1943, p. 1121, § 1 b, amending L. Ill. 1933, p. 924.

serving Corp. case the State to which the purchaser took the ties might also have sought to tax the transaction by levying a use tax. But we did not withhold the hand of Indiana's tax collector on that account. Nor is the problem like that of an attempted tax on the gross proceeds of an interstate sale by both the State of the buyer and the State of the seller. Cf. *J. D. Adams Mfg. Co. v. Storen*, *supra*. We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. Such "local activities or privileges" (*McGoldrick v. Berwind-White Co.*, *supra*, p. 58) are as adequate to support this tax as they would be to support a sales tax. To deny Indiana this power would be to make local industry suffer a competitive disadvantage.

Affirmed.

Mr. Justice JACKSON dissents.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.